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Supreme Court, U.S.
FILED
JAN 2 - 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-851

IN THE

Supreme Court of the United States

JACK J. GRYNBERG, GRYNBERG PRODUCTION CORPORATION, AND ITS SUCCESSORS; GRYNBERG PETROLEUM COMPANY, AND ITS SUCCESSORS, PETITIONERS

v.

TOTAL S.A. AND SHELL EXPLORATION B.V. AND SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. F/K/A SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for writ of certiorari arises out of two diversity actions, for both breach of fiduciary duty and unjust enrichment, brought by Petitioners in the Federal District Court for the District of Colorado. Both actions were dismissed on summary judgment, as having been barred by the statute of limitations and laches respectively. The cases were consolidated on appeal by the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the judgments of the District Court, and denied Petitioner's subsequent Motion for Rehearing and Rehearing *En Banc*.

I. Whether the Court of Appeals violated the due process rights of Petitioners to a fair trial by refusing to consider a dispositive argument which was briefed and argued in the District Courts, and on appeal and petition for rehearing, by wrongly holding that such arguments were raised for the first time on appeal?

II. Whether the Court of Appeals in a diversity action violates principles of federalism set down by this Court by not following a controlling intervening decision of the state's highest court, and by not remanding to the District Court for the factual findings mandated by that state court's decision?

RULE 29.6

Petitioner, pursuant to Rule 29.6 states that it consists of privately held companies and individuals. There is no publicly held corporation that owns any of the companies' stock.

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The Court of Appeals decision appealed is reported as *Grynberg v. Total S.A.*, 538 F.3d 1336 (10th Cir.2008) [APP. 1a]. This was a consolidated appeal affirming two District Court decisions: *Grynberg v. Shell Exploration B.V. et al.*, 433 F. Supp.2d 1229 (D.Colo. 2006) and *Grynberg v. Total S.A.*, 2006 WL 1517731 (D.Colo.2006). [APP. 40a and 53a respectively]

JURISDICTION

The Court of Appeals affirmed the District Court dismissals on August 26, 2008, and denied rehearing and rehearing *en banc* by its Order of October 7, 2008 [APP. 72a]. Jurisdiction is proper here under 28 USC 1254(1), in the Court of Appeals under 28 USC 1291, and under 28 USC 1332 in the District Courts.

RELEVANT PROVISIONS INVOLVED

See appendix.

STATEMENT

The Errors Below

The Court of Appeals made two errors that signal reversal, or alternatively GVR.

The Court of Appeals' explicit refusal to consider dispositive arguments properly raised in the District Courts was a significant departure from the accepted course of judicial proceedings, effectively denying

Petitioner his rights to due process in a way contrary to the decisions of this Court in, *e.g.*, *Dye v. Hofbauer*, 546 U.S. 1, 126 S.Ct. 5, 163 L.Ed.2d 1 (2005) (attached for the Court's convenience APP. 74a.)

In addition, the Court of Appeals did not have the benefit of a recent Colorado Supreme Court decision which casts doubt on its interpretation of Colorado law in this case; and which, had it been considered, would have required a remand to the District Court for particularized factual findings mandated by that decision. Respect for principles of federalism in diversity jurisdiction therefore requires reversal in accordance with this Court's decisions in, *e.g.*, *Lords Landing Village v. Continental Ins. Co.*, 520 U.S. 894, 117 S.Ct. 1731, 138 L.Ed.2d 91 (1997) (attached at APP. 109a.)

Even if one assumes, *arguendo*, that the Court of Appeals had all the discretion needed to ignore any argument that Petitioners presented to them, their decision must be reversed on the second ground - failure to follow state law in accordance with this Court's precedents.

Background

In 1990 Petitioners ("Grynberg") discovered the potential of one of the world's largest oil fields, the Kashagan Field in the Caspian Sea offshore Kazakhstan. That field has since been explored, and its enormous potential confirmed.

Grynberg is highly experienced in oil and gas exploration and production, but as an independent

producer lacked the substantial resources necessary to exploit the full potential of the Kashagan Field. Grynberg therefore made a deal with a group of major international oil producers including Respondents ("Total" and/or "Shell"): In return for Grynberg's confidential seismic information about Kashagan's potential and his pioneering contacts with the political leadership of Kazakhstan, Respondents agreed to give Grynberg a "carried interest" in any profits achieved from the Field, i.e. they would pay Grynberg's share of the expenses up front, and take them from Grynberg's share of profits later. Specifically, Grynberg was to receive 20% of the net profits realized by Shell and Total from the oil and natural gas they each produced from Kashagan. At the time these lawsuits were filed no such profits had been made, nor have any been made yet.

Spurred by Grynberg's information, but without including Grynberg, Shell and Total sought to acquire exploration and production interests in what was called the AMI (the "Area of Mutual Interest.") These efforts resulted in 1997 in agreements between, *inter alia*, Shell and Total and the government of Kazakhstan.

In 2002 the Kashagan Field was declared to be commercial. Total and Shell, however, failed and refused to recognize Grynberg's interest and rights under their agreements with him made in 1990. Accordingly, in 2003 Grynberg filed the instant actions against Total and Shell, alleging breach of fiduciary duties and unjust enrichment.

Total and Shell denied having any deal with Grynberg, but that factual issue was never reached.

Instead, both actions were dismissed below on summary judgment. The District Courts held, and the Court of Appeals affirmed, that both the Colorado statute of limitations and the period of equitable laches began to run when Grynberg learned of the Respondents' 1997 agreements with Kazakhstan, even though nothing due to him had by then been taken or withheld.

Remarkably, therefore, Grynberg's unjust enrichment claim for a percentage of unpaid profits was time barred before Respondents ever made any profits or wrongfully refused to pay Grynberg his agreed share. The critical facts on this issue were agreed to by everyone – in 2004, for example, the year *after* Grynberg's complaint was filed, Total's counsel declared that Total had still not been enriched at all, let alone unjustly so. [APP. 118a-119a, Letter June 11, 2004, p.2, para. 4.]

Accrual Argument – Due Process

In response to the Respondents' statute of limitations and laches defenses in the District Courts, Grynberg argued that his unjust enrichment claim could not have accrued until the Respondents had been unjustly enriched – an element of the cause of action that logically could not occur until there were profits earned and retained by Respondents without paying over to Grynberg the share that would then be due. That argument was exactly consistent with the decision of the Second Circuit Court of Appeals in *Golden Pacific Bancorp v. Federal Deposit Insurance Corporation*, 273 F.3d 509, 520 (2nd Cir. 2001), founded on the arguments made in that case by appellants'

attorney and now Chief Justice Roberts. [APP. 136a-141a contains relevant excerpts from *Golden Pacific* and the Chief Justice's brief]

Nonetheless, the Court of Appeals in affirming the dismissals refused to consider Grynberg's accrual argument and its consequence that his claims should, at most, only be dismissed without prejudice as premature. Their refusal was based solely on Grynberg's [APP.38a] supposed failure to raise this argument below, when the record showed this argument was presented in both District Courts. [APP.125a-135a, and 52a]

How this happened is legally important; and while the factual merits of this billion dollar private controversy might not call for this Court's scrutiny, the legal errors made by the Court of Appeals for the Tenth Circuit certainly do. This Court should grant certiorari under S.C.R. Rule 10 to order these errors corrected because the Tenth Circuit, by their surprising refusal to hear Grynberg's dispositive argument, "has so far departed from the accepted and usual course of judicial proceedings" and has "sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." In this case, to insure due process.

The State Law Argument

Moreover, and as an independent reason to grant certiorari and reverse, nearly a year after the briefing and oral argument had closed in the Court of Appeals, but only eight days before its decision was issued, the Colorado Supreme Court decided the case of *Lewis v.*

Lewis, 189 P.3d 1134 (Colo. 2008) ("*Lewis*",APP. 79a) The opinion in *Lewis* significantly revised Colorado's law of unjust enrichment in a way that calls into question the Court of Appeals' application of the state's law in this case. It is apodictic that the District Courts could not have applied the *Lewis* decision.

The Court of Appeals discussed and relied upon *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000) to reject Grynberg's argument on the time of accrual [APP. 32a-33a]. *Lewis* casts doubt on this reliance because in *Salzman*,

> "we had no reason to confront the issue before us today and did not consider how the third prong determination that enrichment is unjust is analyzed in particular factual circumstances" [APP. 102a]

This circumstance is exactly that which requires reversal by this Court, to protect the central principle of federalism, *viz.* the integrity of state law in federal diversity jurisdiction. Reversal, not GVR, is appropriate because of the particular factual findings required by *Lewis* to be made in Colorado's trial courts in cases of unjust enrichment.

Conclusion

For these reasons, as amplified below, Appellants respectfully request that this Court grant certiorari and reverse, or vacate the decision of the Court of Appeals, and remand for consideration by the Court of Appeals the argument on accrual in *Golden Pacific*, and for their consideration of the effect of

Lewis, supra, which dictates further remand by the Court of Appeals to the District Court for essential fact-finding in this case.

REASONS FOR GRANTING THE PETITION

SUMMARY

The principal reasons for granting this Petition are the implications the Court of Appeals' decision has both for due process and for the respect due to state law in federal courts' diversity jurisdiction. These reasons are elaborated below, and followed by a discussion of additional substantive concerns.

First Reversible Error - Violation of Due Process

The Court of Appeals in this case made at least three errors, each of which independently justifies reversal or remand under the decisions of this Court.

Its first error is difficult to fathom: The Court expressly refused to consider a potentially dispositive argument made in the District Court, briefed and argued on appeal by the parties, and raised again on petition for rehearing and rehearing *en banc.* The only reason given for this refusal was that the "argument[s] were raised for the first time on appeal." [APP. 38a, Court of Appeals decision, 538 F.3d 1336, 1354.] That is simply not so, a fact which Petitioner brought squarely to the Court's attention in its petition for rehearing – a petition the Court of Appeals denied without explanation.

This Court has granted certiorari, reversed, and remanded ("GVR") in highly analogous circumstances. *Dye v. Hofbauer*, 546 U.S. 1, 126 S.Ct. 5, 163 L.Ed.2d 1 (2005)] (APP. 74a.) Referring to the first of two errors meriting reversal of the judgment in *Dye*, this Court found that the Court of Appeals had erroneously overlooked a brief filed below, and then had erroneously held, that since the argument in it had not been presented below, the court would not consider it on appeal. *Dye* cited and relied upon *Smith v. Digmon*, 434 U.S. 332, 333, 98 S.Ct. 597, 54 L.Ed.2d 582 (1978) (*per curiam*), in which this Court found it "too obvious to merit extended discussion" that it was error for a state appellate court to choose to ignore a claim squarely raised below.

The same standard was set for the federal appellate courts by this Court in *Dye*. It is a violation of due process for the Court of Appeals here to overlook a potentially dispositive argument made in the District Court and briefed and argued by the parties, refusing to consider it by holding it had not been raised below – even though it had been. [APP. 33a] See [APP. 125a-135a] (pages from District Court Transcript, Ct. of Appeals App. pp. 1411-1425, showing Grynberg's argument was made in the District Court in *Total*); and see *Grynberg v. Shell*, 433 F.Supp. 2d 1229, 1235 [APP. 52a] (granting Petitioner's motion to file supplemental authorities, including the *Golden Pacific* case).

The argument that the Court of Appeals refused to consider was a very good one, the same as made by the Chief Justice of this Court when appearing as counsel in *Golden Pacific Bancorp*, and wholly accepted by the Second Circuit. [APP. 136a – 141a contains the

relevant holding at p.520 of *Golden Pacific*, and pp. 34-38 of the Chief Justice's brief in that case.] It is irrelevant that *Golden Pacific* was decided under New York law, and this case was argued and decided under Colorado law. In fact, since *Lewis*, *Golden Pacific* should be seen as even more persuasive in Colorado. *Lewis* found that an unjust enrichment action accrued after 14 years of dealings when a house was actually sold and defendants actually appropriated the money. [APP.82a, 84a, 99a]

Golden Pacific's logic is powerful, its principles are consistent with this Court's jurisprudence on limitations, and the decision does not conflict with Colorado law on this point as is shown more fully below. In short, *Golden Pacific* holds that there must be both an actual **and** unjust enrichment of the defendant before the clock starts ticking on the plaintiff's claim. So does *Lewis*. If that argument had been considered and accepted below it would have defined Grynberg's case as premature, and resulted in a dismissal without prejudice.

Second Reversible Error – Failure to Follow State Law

The Court of Appeals' second error is more understandable, but it is equally critical. Only eight days before the Court of Appeals opinion was issued, the Colorado Supreme Court issued its opinion (modified on rehearing) in *Lewis v. Lewis*, 189 P.3d 1134 (Colo.2008). *Lewis* was not cited, discussed, or applied by any Court below, and did not come to the attention of Grynberg's counsel until beginning the preparation of this Petition. Nonetheless, *Lewis* was the law of

Colorado at the time of the Court of Appeals decision, and it casts doubt on that court's interpretation and application of state law in this case.

This is because the Court of Appeals focused in its analysis on the "benefit" conferred by the Plaintiff to reject Grynberg's arguments. *Lewis*, however, had decided to "untether unjust enrichment from its central focus on the benefit conferred by the plaintiff" and that "unjust enrichment occurs when one party benefits from an action that is a significant deviation from that mutual purpose" of the parties [APP. 112a DISSENT, and 104a]. None of these holdings were considered by the Court of Appeals.

In a four to three *en banc* decision, *Lewis* announced new law governing the necessary elements of unjust enrichment claims in Colorado, the procedures for determining them, and the standards for review on appeal. In particular, in cases involving "confidants," a term not defined in *Lewis*, the Colorado Supreme Court set forth new "particularized factual" tests for such cases, and set out specific factual determinations to be made by the trial courts, none of which were considered, argued or made by the courts below. [APP. 90a, 95a, 96a]

Under the new rules in *Lewis* the Tenth Circuit should have remanded to the trial court for the particular factual inquiries newly required by Colorado law in trials of unjust enrichment claims. A trial court addressing an unjust enrichment claim must, under *Lewis*, determine whether the case is one between confidants, then apply a particularized factual analysis of the relationship of the parties to determine whether

the enrichment was unjust. *Lewis* at 1142. [APP. 98a] Parenthetically, the *Lewis* opinion underscores this need for remand to the trial court in its holding that appellate review of unjust enrichment claims must be for abuse of discretion and not *de novo*. [APP. 91a-92a]

In a case indistinguishable in principle from this one, this Court has granted certiorari, vacated the judgment below, and remanded the case for further consideration by the Court of Appeals. *Lords Landing Village v. Continental Ins. Co.*, 520 U.S. 893, 117 S.Ct. 1731, 138 L.Ed.2d 91 (1997). [APP. 109a-115a] In that diversity case, a decision that cast doubt on the correctness of the Court of Appeals decision was handed down by the highest court of Maryland 11 days before the Court of Appeals decision. The Maryland court's opinion had significantly altered the law in its home state, as *Lewis* did here. *Lords Landing* relied upon earlier precedent to vacate a decision that appears to contradict a decision of the state's highest court, exactly as in this case. [APP. 112a], citing *Thomas v. American Home Products Inc.*, 519 U.S. 913, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996).

Third Reversible Error – Erroneous Exclusion of Contract Principles

The Court of Appeals was wrong in this case for the third time when it refused to consider the application of certain contract principles that would as Grynberg argued, delay accrual of his unjust enrichment claims. As *Lewis* also showed, some contract principles defining damages due to an aggrieved party are applicable to unjust enrichment

claims in Colorado. *Lewis*, 1141, 1145. [APP. *Lewis* at 93a, 96a]

Strikingly, if the Court of Appeals had been willing to analyze *Golden Pacific*, and had considered *Lewis*, they should have realized that both cases agree that the time of accrual issue should be resolved as argued by Grynberg. *Lewis*, binding on the Court of Appeals, did not find that unjust enrichment accrued during a 14 year course of dealings while a residence continued to appreciate in value. Until it was sold and the defendant appropriated the proceeds, as in *Golden Pacific*, there simply was no enrichment, and no action for unjust enrichment.

The combination of these three errors, *viz.* overlooking and then refusing to consider a dispositive argument in the record, as well as making rulings contradicting two intervening holdings of Colorado's highest court, have resulted in a decision that illustrates the costs of a departure far from the accepted and usual course of judicial proceedings. It is also far from the fundamentals of logic and reason: a claim for unjust enrichment thrown out as filed too late before it has arisen.

Additional Substantive Concerns

There is, however, a dimension of the decision below which, if not corrected, could be the source of additional mischief and confusion. The substantive effect of the decisions in the District Court, as affirmed by the Court of Appeals, is that a limitations period (including that of equitable laches) can begin to run – *i.e.* the claim can *accrue* – before all of the elements of a

cause of action have occurred. This case has already been cited for exactly that – in a recent Wyoming state court case one of the District Court decisions was summarized as "Claims for profits barred by statute of limitations even though no profits generated at time suit was filed." [APP., 123a, excerpt from Wyoming State court brief.]

More important is the potential precedential effect on federal law. This Court has long been concerned with the proper application of statutes of limitations – particularly so as regards the point of accrual, the very point at issue in this case. See, *e.g.*, *Rawlings v. Ray*, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605 (1941) (limitations period does not begin to run until there is a "complete cause of action"); *Crown Coat Front, Co. v. United States*, 386 U.S. 503, 87 S.Ct. 1177, 18 L.Ed.2d 256 (1967) (underscoring the significance and nature of the moment of accrual); *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (holding that accrual occurs when an **injury** occurs); *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) (holding discovery rule runs from time when the plaintiff should have known of an **injury**); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (holding that a cause of action does not accrue until a plaintiff could file suit and gain relief); and see *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) and *Rotella v. Wood*, 526 U.S. 1003, 119 S.Ct. 1139, 143 L.Ed.2d 207 (1999) (both dealing centrally with RICO statute of limitations and holding that a cause of action accrues once an injury has occurred.)

Moreover, the progeny of *Erie* itself have underscored the importance of federal courts getting the statute of limitations criteria right. See, *Guaranty Trust Co. v. York*, 326 U.S. 99, 102, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (holding that under the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts sitting in diversity must respect state law with respect to statutes of limitations.) And see, *Walker v. Armco Steel Corp.*, 446 U.S. 740 at 753, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980) (requiring punctilious adherence to state court limitations rules to avoid jurisdictional forum shopping), reaffirmed in *West v. Conrail*, 481 U.S. 35, 39, 107 S.Ct. 1538, 95 L.Ed.2d 32 (1987).

The Court of Appeals also upheld a laches defense to Grynberg's unjust enrichment claim, applying the doctrine woodenly as if it were exactly the same as the statute of limitations. This Court has more than once addressed equitable laches, noting that its application is almost always outcome determinative, and that as a flexible equitable doctrine it must not slavishly follow the law. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), citing *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). Laches requires proof of both (1) lack of diligence by the claiming party and (2) prejudice to the party asserting the defense – questions of fact in each case, not at all like the arithmetic calendar calculation of legal statutes of limitation. See, *e.g.*, *Costello v. United States*, 365 U.S. 265 at 282-283, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961) (denying laches defense when no prejudice to government shown); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 at 215-216, 83 S.Ct. 1185, 10 L.Ed.2d

297 (1963) (stressing the requirement of a factual finding of prejudice); *Kansas v. Colorado*, 514 U.S. 673, 115 S.Ct. 1733, 131 L.Ed.2d 759 (1995) (finding no laches absent showing of inexcusable delay); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 at 105, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (reiterating the complementary requisites of lack of diligence and prejudice); and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 at 203, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) (requiring prejudice in the form of reliance or change in the condition of the parties attributable to delay.)

For these reasons, as amplified below, Appellants respectfully request that this Court grant certiorari and reverse, or vacate the decision of the Court of Appeals, and remand for consideration by the Court of Appeals Petitioner's argument on accrual, and for its consideration of the effect of *Lewis*, *supra*, including the need for remand by the Court of Appeals to the District Court.

ARGUMENT WITH RESPECT TO QUESTION I

A. The Court of Appeals' Refusal to Consider Petitioner's Accrual Argument Based Upon an Erroneous Reading of the Record Violates Due Process

In *Dye v. Hofbauer*, 546 U.S. 1, 126 S.Ct. 5, 7, 163 L.Ed.2d 1 (2005) this Court found it was reversible error for a Court of Appeals to refuse to consider a litigant's federal claims properly presented:

> As the prosecutorial misconduct claim was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand.

In fact, courts of appeals can consider arguments not even raised in the district courts, in their sound discretion so that justice may be done. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Doing so is not merely permitted; under foundational principles of diversity it is expected that federal courts will do so. *Rupe v. Strato-Tower, Inc.*, 1988 US Dist LEXIS 11317 at *3-4 (KS 1988) (when exercising diversity jurisdiction a court must apply the correct state law even when the parties haven't cited it and even when one of the parties had abandoned the theory); *Royal Maccabbees Life Ins. Co. v. Choren*, 393 F.3d 1175 esp. at 1180 and n.1 (10th Cir. 2005) (because a federal court has an "independent duty to determine . . . state law" an appellate challenge is reviewed for plain error even if the argument is waived below); *Italverde Trading, Inc. v. Four Bills of Lading*, 485 F.Supp.2d 187 at 194 and 196 (EDNY 2007) (even though the parties hadn't briefed a choice of law issue, the Court sitting in diversity "must apply" the substantive rules of the state.)

The question here is whether in a diversity case it is reversible error to refuse to consider, not merely to overlook, an argument actually raised in the District Court. The Court found that it was not raised below, although it clearly was, as reflected in the District Court record. The argument in the *Total* case had been fully argued to the District Court [APP. 125a – 135a]. The argument in the *Shell* case had been raised by

application for leave to cite *Golden Pacific* as supplemental authority – an application opposed by Shell, but granted by the Court. *Grynberg v. Shell Exploration B.V.*, 433 F.Supp.2d 1229, 1235 (D.Colo.2006) [APP.52a]. The argument was fully briefed by Petitioners and Respondents on appeal. And it was potentially dispositive in both cases, as evidenced by the decision of the Second Circuit in *Golden Pacific*.

Two other arguments, one not raised below (misappropriation of trade secrets) and one raised only by a Rule 59 post trial motion (urging a 6 year as opposed to a 3 year statute of limitations) were **properly** not considered. Respondents had objected to these two arguments based on waiver, but they had not objected to the accrual argument as waived. The Court of Appeals' ruling on the latter was entirely *sua sponte*. The Court of Appeals not only **could** have considered it, *Singleton*, but should have, *Dye*. The failure to do so has deprived Grynberg of his right to due process and to a fair trial.

B. The Court of Appeals' Refusal to Consider the Accrual Argument Resulted in the Wrongful Dismissal With Prejudice of the Unjust Enrichment Claims

Grynberg's accrual argument rests on the fact that until Shell and Total's production in the AMI became profitable, any actions they had taken to pursue agreements with Kazakhstan or to engage in exploration and development had caused Grynberg no injury. He had suffered no loss and therefore no cause of action had accrued. And, perforce, the period of

limitations – whether that of equitable laches or that of the statue of limitations – could not have begun to run.

The importance of this logic is underscored by the Court of Appeals' own analysis. The parties had treated the unjust enrichment claim separately from the breach of fiduciary claim, and the Court did as well. It began its discussion of the limitations period as it applied to the fiduciary claim by noting that the elements of such a claim include "damage" to the beneficiary by action of the trustee. In fiduciary law, however, as the Court holds, the damage that triggers a claim may include benefit to the trustee, and benefit includes "any form of advantage" [APP. 33a, 538 F.3d 1347-1348.] According to the District Courts, Shell and Total gained an advantage when they acquired their interests in the AMI, not later than 1997, and with that the only remaining question for the Court was when Grynberg might have learned of it.

The elements of a claim of unjust enrichment, however, are not the same as those of an action for breach of fiduciary duty. While the remedy is the same in both cases - restitution to the injured plaintiff - the substantive predicates, or the elements of the causes of actions, are different in an important way. The Court of Appeals at first recognized this, reciting, *Id.* at 1351, [APP. 82a], that unjust enrichment includes three components: The Defendant must have gained a benefit, *at the plaintiff's expense,* which it would be unjust for the Defendant to retain. For the tort of breach of fiduciary duty, that is, advantage to the Defendant may be enough. For the claim of unjust enrichment, the gain to the Defendant must have come at the expense of the Plaintiff.

When it came to applying the limitations period to the unjust enrichment claim, the Court of Appeals ignored this distinction, precisely because it refused to address Grynberg's argument about accrual. For unjust enrichment, as Grynberg attempted to argue, no cause of action accrues until the plaintiff suffers a loss; and in this case, under these facts, that had not yet happened. The Court, however, asked only when the Defendants acquired their benefit – using exactly the criteria it had applied to the breach of fiduciary claim, and concluding by saying, in effect, that that issue had already been covered. Had the accrual argument been considered, this error could not have occurred – Grynberg's Opening Brief was quite explicit on this very point. The Court of Appeals, however, flatly declined to consider that part of Grynberg's brief. [Id. at 1354-55, APP. 38a.]

One of the central authorities cited by Grynberg in its accrual argument is, again, *Golden Pacific*. What is so striking about that decision is its focus on exactly this problem – the Tenth Circuit's eliding the elements of the pertinent claim by ignoring the question of time of accrual.

Golden Pacific is cited in the leading treatise on the law of restitution as standing for two propositions: First, that the statute of limitations (or the analogous period for laches) begins to run "when the cause of action accrues," which is on the occurrence of all the acts that give rise to the duty of restitution. And second, that the cause of action in a case such as this includes the requirement that the Defendant has been enriched *at the Plaintiff's expense*. G. Palmer, *Law of Restitution*, 2009 *Cum. Supp. No.* 1 at 268 and 213

respectively, analyzing the meaning of *Golden Pacific*. In that case, Palmer says, the cause of action had not accrued because the funds in question could not have been returned to the plaintiff in any event; and thus whatever benefit there may have been to the FDIC, there had been no loss to the bank and thus there was no unjust enrichment at plaintiff's expense – hence no cause of action had accrued. And see *Hughes v. LaSalle Bank, NA*, 419 F.Supp.2d 605 (SDNY 2006), reading *Golden Pacific* as premised on the notion that unjust enrichment, unlike the tort of breach of fiduciary duty, includes the element of value *taken from the plaintiff*.

To the contrary, a reasonable argument could be made that Grynberg received a benefit and not a detriment, from Respondents' deal with Kazakhstan, because his 20% carried interest would probably have increased in value. Grynberg still held his 20% interest in net profits and so had lost nothing.

The decisions of this Court support that conclusion. Restitution, this Court has held, is a remedy applied for the purpose of "restoring the status quo and ordering the *return* of that which *rightfully belongs* to the purchaser or tenant." *Tull v. United States*, 481 U.S. 412, 424 , 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (Emphasis added.)

Restitution in equity is not duplicative of damages recoverable in legal actions; it exists to restore that which the Defendant has wrongfully taken from and withholds from the Plaintiff. Until the exploration in the Caspian Sea became profitable, there

was nothing that Total or Shell could have retained since under their "carried interest" agreement with Grynberg there was nothing whatever for them to pay until profits from the Field were realized.

In *Rawlings v. Ray*, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605 (1941) this Court held that a period of limitations begins when there is a "complete and present cause of action" – such that the putative plaintiff could have a recovery by suit. The principle was reinforced, citing *Rawlings v. Ray*, in *Bay Area Laundry & Dry Cleaning v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed. 553 (1997), which held that a statute of limitations could not begin to run while a party "could not yet file suit." Id. at 200-201. "A cause of action does not become 'complete and present' for limitations purposes until the plaintiff could file suit and obtain relief." Id. As we have shown, unjust enrichment requires a loss to the complaining plaintiff. Until that happens, the cause of action is not complete and the statue cannot begin to run. The accrual argument, in short, is a key to the proper outcome in the present case. If the compelling logic and recognized principles of unjust enrichment in *Golden Pacific* were applied here, Grynberg's claims should be held premature, as opposed to time-barred.

ARGUMENT WITH RESPECT TO QUESTION II

C. An Intervening Opinion by the Highest Court of A State, Which Puts in Question a Federal Court's Application of State Law, Must be Considered

The signal principle of federalism, first outlined in *Erie Railroad Co. v. Thompkins, supra*, requires that a federal court sitting in diversity apply the substantive law of the forum state that is in existence at the time it renders its decision. *Erie, supra; Salve Regina College v. Russell*, 499 U.S. 225, 226, 111 S.Ct. 1217, 1218, 113 L.Ed.2d 190 (1991).

That principle underscores this Court's 'longstanding practice' of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest court of the state. *Lords Landing Village v. Continental Ins. Co.*, 520 U.S. 893, 117 S.Ct. 1731, 138 L.Ed.2d 91 (1997). Thus where a federal court of appeals' decision on a point of state law is cast in doubt by an intervening decision of a state's highest court while the case is on direct review, it has become the practice of this court to vacate and remand so that the question can be decided by judges familiar with state law. *Stutson v. U.S.*, 516 U.S. 163, 116 S.Ct. 611, 612, 133 LEd.2d 545 (1996), *Huddleston v. Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944) (*per curiam*).

Just prior to the Court of Appeals' decision in this case, the Colorado Supreme Court issued its opinion in *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008).

[APP. 79a – 108a] In *Lewis* the highest court in Colorado issued a ruling that addressed previous inconsistencies in its own courts' application of the law of unjust enrichment. Although the import of the *Lewis* case was not known at the time of Petitioners' Petition for Rehearing and Rehearing *En Banc*, there is every reason to question the correctness of the Court of Appeals' affirmance of the District Court's decisions; and, pursuant to this Court's opinion in *Lords Landing*, to grant certiorari, vacate the judgment, remand to the Court of Appeals for consideration of the applicable state law, and remand to the District Court for the fact finding that is required under *Lewis*.

D. Colorado's New Law of Unjust Enrichment as Announced in the Intervening State Court Decision Casts Doubt on the Court of Appeals' Opinion

Lewis v. Lewis was decided just eight days before the decision by the Court of Appeals in this case. In *Lewis* the Colorado Supreme Court significantly revised the elements of an unjust enrichment claim under Colorado law. Unjust enrichment has always had three "prongs" – (1) the defendant must have been enriched, (2) at the plaintiff's loss or expense, (3) under circumstances that make retaining the enrichment unjust. *Lewis* focused on the need in certain situations to evaluate the "third prong"– whether the enrichment was unjust – in a way not previously described in Colorado law. The new test is particularly important in cases involving relationships between "confidants."

While the court did not identify an exhaustive list of relationships that would require this focused

analysis, the *Lewis* case itself involved a situation of confidence including mutual expectations never reduced to writing, yet violated by one party's arrogating a benefit to themselves. In *Lewis* a home was owned by the defendant in-laws and occupied by the plaintiffs. The plaintiffs, among other things, made payments to the defendants in the amount of a mortgage loan repayment owed to a lender by the defendants for 14 years. Title nevertheless remained in the defendants, although promises to transfer it were made. When the house was sold the defendants kept the proceeds to themselves, the act held to be the unjust enrichment. Note that there was no such claim made solely on the basis that title was withheld contrary to defendants' promises. The actual sale and receipt of the plaintiffs' money was a necessary element of this claim.

The most striking aspect of the *Lewis* case is that the monthly payments took place over 14 years and were retained by the defendants with no return or recognition to the plaintiff. It was not until the house was sold, proceeds were received, and the defendants failed to share any of the funds with the plaintiff that the cause of action accrued – facts remarkably like the accrual issue in the present case. Specifically, whatever may have been *retained*, the retention was not at the plaintiff's expense (a requirement thrice noted by the *Lewis* court), and the retention was not *unjust* until some action occurred that was wrongful *vis-à-vis* the plaintiff, *i.e.* contrary to the parties' mutual understanding.

Using *Lewis* as a guide to the correct Colorado law of unjust enrichment, the Court of Appeals should

be ordered to remand to the District Court that must analyze the facts to determine whether the relationship between Grynberg and Total and Shell was one between confidants; and whether there was between them a mutuality of purpose *e.g.* acquiring rights for exploration in the AMI. The retention of any benefit gained by Total or Shell (*e.g.* their 1997 agreements with Kazakhstan) is – even if a benefit – required to be retained at Grynberg's expense and, under the law of *Lewis*, *unjustly* retained by some further act that would be inconsistent with the scope of their mutual understanding. *Lewis* describes this as "particularized factual analysis", and it certainly is that.

Petitioner argues such an analysis would necessarily result in a finding that Grynberg was, in these circumstances, a "confidant" of Total or of Shell. The entire case was based on providing confidential information to people Grynberg trusted. He further argues that the confidential information provided, and the "mutual understanding" between them, was what made it possible for Total and Shell to pursue relationships with Kazakhstan for the benefit of all of the co-venturers including Grynberg. Moreover, the first if not the only action taken contrary to that understanding would be Total's or Shell's failure to pay to him his share of the profits after there were profits to be shared. A trier of fact could also easily conclude there was no **unjust** retention of a benefit until 2002 at the very earliest and thus no accrual of Grynberg's cause of action before that date. Now, every one of those questions has become directly pertinent to the facts of this case under the new rules set out in *Lewis*. Neither the District Courts nor the Court of Appeals has addressed any of these clearly pertinent factual

inquiries. Under the standard set forth in *Lord's Landing*, this case must be reversed for its failure to follow current Colorado law.

E. The Court of Appeals Erred in Failing to Consider Lewis' Holdings to Apply Some Contract Principles to Unjust Enrichment Claims

The Colorado Supreme Court's decision in *Lewis* is inconsistent with another application of Colorado law by the Court of Appeals in this case. Adverting to the questions raised by Grynberg's argument to delay accrual until his share of profits went upaid, the Court of Appeals held the following [APP. 33a-34a]:

> Grynberg argues that the defendants would not have done anything improper – and therefore would not be unjustly enriched until they refused to pay Grynberg as required by their 1990 agreements, namely, when they started receiving profits from production of oil and gas in the AMI. **But that analysis would be proper only if Grynberg were suing for breach of contract.** If it were, one could say that breach has not occurred until a defendant has not performed under the contract, and neither Shell nor Total owed any duty of performance until it started earning profits from production. Grynberg's complaints, however, do not allege breach of contract. They allege unjust enrichment, and the benefit to a defendant is what matters, not the breach of a promise to pay that is not the basis of the claim." (Emphasis added.)

In so holding the Court of Appeals made a distinction which the meaning of *Lewis* does not permit – namely, that the labeling of the cause of action (contract versus unjust enrichment), rather than the reality of the remedy, is determinative of accrual for purposes of limitations and laches. It is not so in Colorado, and was not so even before *Lewis* was decided. *DCB Construction Co. v. Central City Dev. Co.*, 965 P.2d 115 (Colo. 1998). *Lewis* held "that the trial court acted within its discretion when it determined that the Lewises **were unjustly enriched by the sale of the Platteville house**. [APP. 101a] (Emphasis added).

The sums due to Grynberg under an unjust enrichment claim would be those unjustly retained at his expense, *i.e.* his share of any net profits earned but not paid over to him. The sums due to Grynberg under a contract claim would be the damages he suffered from the Defendants' breach, *i.e.* his share of any net profits earned but not paid over to him. It is retrograde at best to hold that "accrual" of a claim for limitations purposes differs between the two causes of action.

The Colorado Supreme Court held in *Lewis*, citing *DCB, supra*, "When restitution is the primary basis of a claim as opposed to a remedy for bargains gone awry, it invokes what has been called a 'contract implied in law.' And the dissenting opinion in *Lewis* made clear that implied contract is just what the *Lewis* majority held – that the basis of unjust enrichment recovery is that of implied contract:

> [T]he trial court erred by awarding contract damages, and the majority errs by applying

> contract principles, under the guise of unjust enrichment, to uphold the trial court's award." [Dissent, Lewis, APP. 104a].

For better or worse, since *Lewis*, contract principles are to be applied to unjust enrichment claims under Colorado law. Because the Court of Appeals did not consider *Lewis*, it erred in refusing to apply the principles urged by Grynberg to the accrual of unjust enrichment claims, exactly as they had been applied in *Golden Pacific*, and as recently permitted by *Lewis*.

The Court of Appeals thus erroneously limited the reach of the equitable remedy of unjust enrichment by holding that Grynberg's accrual argument could succeed "only if Grynberg were suing for breach of contract". In effect, because there was no actual contract alleged, Grynberg's accrual argument is held worthless, and inapplicable to unjust enrichment, even though it is a claim based upon a "contract implied in law. " This holding was clearly wrong in the intervening light of *Lewis*, reaffirming *DCB*, and applying contract principles to unjust enrichment in Colorado. *Lewis* certainly "casts doubt" on the correctness of this Court of Appeals' holding, and, as in *Lords Landing*, this Court should reverse it for failure to follow current Colorado law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari, and reverse the decision of the Court of Appeals, or vacate said decision and remand for reconsideration with appropriate directions.

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(any footnotes trail end of each document)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
August 26, 2008, Filed

No. 06-1328,

JACK J. GRYNBERG; GRYNBERG PRODUCTION CORPORATION, and its successors; GRYNBERG PETROLEUM COMPANY, and its successors,
Plaintiffs - Appellants,
v.
TOTAL S.A.,
Defendant - Appellee.

No. 06-1355

JACK J. GRYNBERG; GRYNBERG PRODUCTION CORPORATION and its successors; GRYNBERG PETROLEUM COMPANY, and its successors,
Plaintiffs - Appellants,
v.
SHELL EXPLORATION B.V. and SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. f/k/a SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.,
Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.
(D.C. NOS. 03-CV-1280-WYD-BNB and 03-CV-01212-LTB-PAC).

COUNSEL: Michael S. Porter, Wheat Ridge, Colorado, (Roger A. Jatko, Grynberg Petroleum Company, Greenwood Village, Colorado, with him on the briefs) for Plaintiffs - Appellants Jack J. Grynberg; Grynberg Production Corporation, and its successors; Grynberg Petroleum Company, and its successors.

John P. Bowman (William J. Boyce, Jennifer Lee Price, and Christopher R. Hart, with him on the briefs) of Fulbright & Jaworski L.L.P., Houston, Texas, for Defendant - Appellee, TOTAL S.A.

Roger A. Jatko, Grynberg Petroleum Company, Greenwood Village, Colorado, for Plaintiff - Appellant Jack J. Grynberg; Grynberg Production Corporation and its successors; Grynberg Petroleum Company, and its successors.

Graham Kerin Blair, Baker & McKenzie LLP, Houston, Texas (Marcy G. Glenn and John F. Shepherd, Holland & Hart LLP, Denver, Colorado, and David A. Brakebill and J. Chad Newton, Baker & McKenzie LLP, with him on the briefs), for Defendants - Appellees, Shell Exploration B.V. and Shell International Exploration and Production B.V. f/k/a Shell International Petroleum Maatschappij B.V.

JUDGES: Before HARTZ, McKAY, and TYMKOVICH, Circuit Judges.

OPINION

HARTZ, Circuit Judge.

I. INTRODUCTION

Jack Grynberg (Mr. Grynberg), Grynberg Production Corporation, and Grynberg Petroleum Company (collectively, Grynberg) appeal from summary judgments in two separate lawsuits, one against Total S.A. and one against Shell Exploration B.V. and Shell International Exploration and Production B.V. (collectively Shell). Both lawsuits, which were filed in 2003 in the United States District Court for the District of Colorado as diversity actions, *see* 28 U.S.C. § 1332, raised essentially identical claims based on essentially the same factual allegations. Grynberg alleged that through its special relationship with authorities in the Soviet Union and Kazakhstan, it obtained valuable information regarding potential oil and gas reserves in Kazakhstan. After obtaining authority from Kazakhstan to form a consortium of companies to join with Kazakhstan in exploring for and developing these reserves, Grynberg approached Shell and Total in 1990 with its information and reached agreements on joining a consortium. Shell and Total, however, joined a different consortium and obtained rights to oil and gas in the very area that was to be the subject of the Grynberg consortium. Grynberg's suits against Shell and Total raise against each a tort claim for breach of fiduciary duty and an equitable claim for unjust enrichment. Shell and Total moved for summary judgment on the ground that Grynberg's claims were untimely, barred by the applicable statute of limitations and laches. The district judges granted the motions.

We have jurisdiction under 28 U.S.C. § 1291, consolidate the two appeals, and affirm. The limitations period for Grynberg's tort claims was three years, and well more than three years before Grynberg filed suit it should have known--from news reports and from

information disclosed in a settlement with a consortium partner of Shell and Total--that it could have sued Shell and Total for acquiring oil and gas interests in the area that Grynberg's consortium was to explore and develop. As for Grynberg's unjust-enrichment claims, they were barred by laches because Grynberg has failed to point to any extraordinary circumstance that would justify extending the laches period beyond the limitations period for the closely allied tort claims.

II. THE COMPLAINTS

The allegations at issue on appeal are those in Grynberg's Second Amended Complaint against Shell (the Shell Complaint) and its First Amended Complaint against Total (the Total Complaint), which overlap substantially. They allege the following:

Mr. Grynberg is fluent in Russian and has "extensive knowledge, training and experience in the field of oil and natural gas discovery and development." Shell Compl. at 16; Total Compl. at 13. After a mining convention in September 1989, he helped obtain plane tickets to Washington, D.C., for a Soviet official and his aide who had been bumped from a flight. The official expressed his gratitude and, at Mr. Grynberg's request, invited him to Moscow in early November to review secret seismic data pertaining to the Caspian Sea and Northwestern Kazakhstan. Mr. Grynberg reviewed the data and decided to focus his attention on one particular region (which he calls the Area of Mutual Interest (AMI)) "because of its enormous potential, and because of its inaccessibility to others at that time." Shell Compl. at 12; Total Compl. at 9. The AMI includes "the largest oil, natural gas, and sulphur discovery in the

world in over 40 years." Shell Compl. at 3; Total Compl. at 2.

Also in November 1989, the United States State Department asked Mr. Grynberg to host a delegation from Kazakhstan that had expressed interest in his cattle-feeding operation. The delegation included First Secretary Nursultan A. Nazarbaev. Mr. Grynberg held a dinner for Nazarbaev, who asked him to assemble teams of experts in the petroleum and mining industries and travel to Kazakhstan to determine whether the region could support those industries. His trip to Kazakhstan in February 1990 confirmed his belief that the AMI had significant potential for oil and natural-gas production. Before returning to the United States, Mr. Grynberg contacted British Gas, British Petroleum, and BP Exploration Operating Company Limited (collectively BP) to discuss the possibility of oil exploration in Kazakhstan.

In April 1990 Mr. Grynberg convinced the President of Venezuela to invite Nazarbaev, who was by then the President of Kazakhstan, to Caracas, where he spent a week with Mr. Grynberg observing western-led oilfield development. During this trip Nazarbaev "reaffirmed his commitment to Grynberg to assist Grynberg in forming an international oil and natural gas consortium to explore, develop and produce oil and natural gas in the AMI of Kazakhstan." Shell Compl. at 13; Total Compl. at 10.

Mr. Grynberg returned to Kazakhstan the next month with a BP executive and a BP team of experts. Nazarbaev permitted Mr. Grynberg to call him by his first name, "indicat[ing] a close relationship, and

friendship." Shell Compl. at 14; Total Compl. at 11. At the end of the trip Mr. Grynberg was authorized by a Kazakh government protocol to form an international consortium for oil and gas exploration in the AMI. To allay Nazarbaev's fears that oil exploration could lead to a natural disaster that would harm the Caspian Sea's sizable premium caviar industry, Mr. Grynberg invited a Kazakh delegation to observe Arctic drilling in Alaska. In June he hosted the delegation as it toured the United States, ending in Alaska with a visit to Prudhoe Bay and the Endicott Oil Fields in the Beaufort Sea, which he used as an example of a large offshore operation conducted without polluting the sea.

The visit led to the signing of additional protocols covering development in the AMI. Mr. Grynberg credited his fluency in Russian, close relationship with Nazarbaev and other important players, and his expertise in the oil-and-gas industry (particularly with regard to advances in undersea production) for his success in negotiating with Kazakh and Soviet officials and obtaining the protocols.

In July 1990 Mr. Grynberg proposed to Shell and Total that they join a consortium led by him in partnership with the Republic of Kazakhstan for the purpose of developing "a profitable and potentially gigantic oil and natural gas industry in the AMI in Kazakhstan." Shell Compl. at 4-5; *see also* Total Compl. at 3-4. Under this proposed consortium agreement, Grynberg was to obtain a 20% working interest in the AMI. The agreement also provided that Grynberg's share of the costs associated with acquiring and developing properties in the AMI would be carried by Shell and Total, who would be reimbursed out of Grynberg's

share of future revenue. To convince Shell and Total that oil exploration in the AMI was a viable prospect, Grynberg gave them "access to geologic maps and seismographic data, together with a detailed economic, technical, and scientific analysis," and told them that he believed that "billions of barrels of oil and trillions of cubic feet of natural gas" could be recovered from the AMI. Shell Compl. at 6; Total Compl. at 5.

Shell accepted Grynberg's proposal. Total responded to the proposal in a letter dated July 20, 1990, which stated, "[W]e basically agree on the proposed principles as set out in your draft." Total Compl. at 4. But nothing came of Grynberg's arrangements with Shell and Total, and the complaints skip seven years to 1997, when Shell, Total, BP, and other oil companies signed an agreement with the government of Kazakhstan giving them oil production rights in the AMI. Although Shell and Total thereby profited greatly from Grynberg's efforts, Grynberg was not included in the deal. In 2002 the Kashagan Field in the AMI was declared commercial. The estimated value of each defendant's interest in the entire AMI is $ 10 billion.

The Shell Complaint summarizes the alleged misconduct as follows:

> [S]everal huge oil companies, including Shell, by their exploration efforts based upon Grynberg's confidential information, were able to determine the value and extent of some of the Kazakhstan oil and natural gas deposits in the AMI. This, they were only able to do as a result of acquiring Grynberg's research, contacts, analysis of confidential scientific data, and organizational

> skills. Nonetheless, Shell, along with others, later went around Grynberg to Kazakhstan directly, cutting Grynberg out of the entire deal, and profiting by billions of dollars. Shell, and others, then denied Grynberg any compensation whatsoever for his valuable contribution to their assets and profits.

Id. at 6. It further states:

> Shell violated its agreement with Grynberg related to this confidential information. The confidential information supplied to Shell by Grynberg, and to other parties to the organization of western oil companies initiated by Grynberg at the behest of the government of Kazakhstan, was specifically provided on condition that Grynberg retained a fair share of the entire deal. Shell breached its agreement with Grynberg, and then waited to enter into its own agreement with others and Kazakhstan to acquire its own interest in the AMI. Shell waited, while ongoing exploration in the AMI confirmed exactly what Grynberg had revealed to Shell in July of 1990, i.e. that the AMI location described contained enormous deposits of oil and natural gas. Then on November 18 of 1997, Shell and others struck a deal with the Republic of Kazakhstan . . . to actually take oil and natural gas production from the Area of Mutual Interest, and to therefore profit immensely from Grynberg's efforts on their behalf.

Id. at 7. The Total Complaint contains virtually identical allegations against Total.

The Shell and Total Complaints also state virtually identical causes of action. Neither asserts a claim for breach of contract. Rather, they each present two other claims. The first is an equitable claim that Shell and Total were unjustly enriched when they "a) used a benefit provided by Grynberg in an unauthorized and unfair manner; and b) retained that benefit conferred on it by Grynberg without paying fair compensation for it." Shell Compl. at 24; Total Compl. at 19. Shell and Total did this by "using Grynberg's contacts, confidential information, and interpretation thereof as aforesaid without paying a penny to Grynberg out of [their] enormous profits." Shell Compl. at 24; Total Compl. at 19. The second cause of action is a tort claim for breach of fiduciary duty. The Shell Complaint alleges that Shell breached "its fiduciary duties to Grynberg in wrongfully using the confidential information imparted to Shell by Grynberg for its own use and profit to the exclusion of Grynberg." Shell Compl. at 24. The Total Complaint alleges that

> a) Total obtained confidential information from Grynberg . . .; b) Total acted as a fiduciary of Grynberg in regard to the confidential information supplied by Grynberg; c) Total breached its fiduciary duty to Grynberg by wrongfully appropriating the confidential information for its own use and profit to the exclusion of Grynberg; and d) Grynberg incurred damages as a result of Total's breach of its fiduciary duties.

Total Compl. at 20. For relief, both complaints sought, in the alternative, (1) 20% of the fair market value of the defendants' interests, less expenses, in the AMI; (2)

a constructive trust on Grynberg's fair share of the defendants' interests in the entire AMI; or (3) disgorgement to Grynberg of the defendants' profits from the AMI.

III. SUMMARY JUDGMENT PROCEEDINGS

Grynberg filed the lawsuits in July 2003. Both Shell and Total raised in their answers the affirmative defenses of the statute of limitations and laches, and the parties filed cross-motions for summary judgment. The parties agreed, at least at that stage of the proceedings, that the applicable limitations period was three years. Although the evidence in the two cases overlaps, we will discuss them separately because the parties presented different evidence and raised different arguments.

A. Shell

Both Shell and Grynberg submitted numerous exhibits to support their positions. These exhibits established the following series of events: In June 1990 the government of Kazakhstan executed several protocols with Grynberg, BP, and other oil companies (but not Shell or Total), purporting to give (1) Grynberg authority to form a consortium and (2) BP rights to study exploration and production "in the Pricaspian Basin of Northwest Kazakhstan." Shell App. Vol. II at 364 (June 1990 Protocol at 1). On May 31, 1991, Grynberg and BP Exploration executed an agreement (the BP Agreement) stating that if either Grynberg or BP Exploration obtained an opportunity to "participate in any petroleum exploration, development, production, processing and transportation opportunities" within the

AMI, it was to share the offer with the other party, and the parties could either jointly accept the offer, or one could decline and the other could accept the offer. *Id.* Vol. III at 764 (BP Agreement at 2).

Notwithstanding the 1990 protocols, the government of Kazakhstan executed in 1993 two consortium agreements with oil companies, including subsidiaries of BP, Shell, and Total. The first agreement, called the "Preliminary Consortium Agreement" (PCA), was executed on June 9, 1993. *Id.* Vol. I at 111 (1997 Agreement). The second agreement, called the "Consortium Agreement" (CA), was executed on December 3. *Id.* at 112. The primary purpose of the CA was to implement an "exploration research study" to obtain and interpret seismic and other geologic data and to assess the environmental impact of oil production. *Id.* at 270. In return for their payments and exploration efforts, the foreign companies were to receive "the exclusive right to select a number of E&P [Exploration and Production] Blocks . . . and to negotiate the terms and conditions for the exploration and production of such E&P Blocks." *Id.* at 112.

Grynberg was not a party to either agreement. But the involvement of Shell, Total, and other oil companies was not secret. Several prominent newspapers carried articles describing the PCA, and identifying BP, Shell, and Total as participants. On June 8, 1993, the day before the PCA was signed, the Wall Street Journal reported that several oil companies were preparing to enter an agreement to perform exploratory work toward developing oil fields in the Caspian Sea in Kazakhstan. On June 10 the paper published a follow-up article stating that the agreement had been signed, that

it addressed only exploration, and that production was not projected to begin until 2000. The New York Times reported on June 9 that the purpose of the agreement was to begin "a seismic exploration program" and that the agreement was "preliminary" and would be followed by a "final agreement" in the fall. *Id.* Vol. II at 526. Also on June 9, the Financial Times stated that the purpose of the agreement was seismic exploration, that a final agreement was to be formed as early as the fall, and that the participating oil companies, in return for financing the surveys and paying a fee to the Kazakh government, would have a right of first refusal to exploit any oil that was discovered. The Los Angeles Times reported on June 10 that a consortium had been formed to explore the Caspian Sea in Kazakhstan. According to the article, after Kazakhstan's entire shelf in the Caspian Sea was surveyed, each participant would be allowed to select blocks in which it would have exclusive rights to the oil.

Later in 1993 the CA also received widespread publicity. On December 6 the New York Times reported that "Kazakhstan signed a final agreement . . . with seven Western companies to explore for oil in the northern part of the Caspian Sea shelf." *Id.* Vol. II at 531. It identified BP, Shell, and Total as among the signatories. Lloyd's List International stated on December 4 that a final agreement had been reached that included BP, Shell, and Total, and that development and production would not occur until after 2000. None of this 1993 news coverage, however, used either the name *Kashagan Field* or *Tazhigali Offshore* (the term originally used by Mr. Grynberg for the Kashagan Field).

Although Mr. Grynberg initially testified in his deposition that television is his primary source of news and business information, that he did not read regular periodicals from 1993 to 2003, and that he never saw reports of the 1993 CA, he then admitted that he had written a letter referring to the June 10, 1993, Wall Street Journal article. The letter, addressed to a BP executive, said:

> Congratulations on the Caspian Sea agreement. After all this hard work I am delighted it has finally come through for all of us. Based on the article in today's Wall Street Journal let's hope this effort will result in the discovery of the world's greatest oil accumulation.

Id. Vol. III at 1031.

Two months earlier Grynberg had sued British Gas in Texas state court for breaching its August 1990 agreement with Grynberg relating to oil and gas rights in the AMI, and for fraud, breach of fiduciary duty, and breach of confidentiality. The suit also sought a declaratory judgment against BP Exploration and others to establish that any rights they had in the AMI were rights against British Gas (not Grynberg). After receiving Mr. Grynberg's congratulatory letter, BP Exploration sued Grynberg in the Southern District of New York, alleging that the 1991 BP Agreement superseded an earlier agreement and was itself unenforceable because it had been terminated by its own terms, the purpose had been frustrated, and performance had been rendered impossible. In the alternative, BP Exploration alleged that Grynberg had breached its obligations (1) under its August 1990

agreement with British Gas, under which BP Exploration was an intended beneficiary; and (2) under the 1991 BP Agreement. We will refer to this pair of lawsuits as the BP Litigation. (Although the BP Litigation eventually settled, the settlement agreement is not part of the record in the Shell Case.)

On November 18, 1997, four years after the CA was signed, Kazakhstan signed a "Production Sharing Agreement" (PSA) covering "The North Caspian Sea (Kashagan)" with several oil companies, including BP, Shell, and Total. *Id.* Vol. I at 100 (1997 PSA). The agreement was signed in Washington, D.C., in the presence of Nazarbaev and Vice President Gore. In an affidavit Mr. Grynberg stated that he obtained a copy of the PSA only in January 2002. But, again, there was extensive contemporaneous news coverage. About seven weeks before the PSA was signed, the Wall Street Journal carried an article stating that six oil companies (including BP, Shell, and Total), having spent $ 300 million on a seismic survey, were planning to enter a production-sharing agreement with Kazakhstan for the Kazakh sector of the Caspian Sea. The day the agreement was signed, articles in the New York Times and the Financial Times stated that BP, Shell, and Total were going to sign a production-sharing agreement with Kazakhstan. The New York Times article identified the Kashagan Field by name. The Financial Times article referred to the area involved as the Kazakhstan sector of the North Caspian Sea. In the days that followed, at least four other periodical articles reported on the subject and named BP, Shell, and Total. One of these articles, in Europe Energy, said that the project's development costs were likely to exceed $ 20

billion, and referred specifically to Kashagan; the other three referred only to the North Caspian Sea.

Grynberg argued that the evidence presented on the motions for summary judgment did not establish that the Shell Complaint was untimely. It contended that the three-year limitations period could not begin until it incurred damages; that it could not incur damages until a field had been declared commercial; and that the Kashagan Field was not declared commercial until June 28, 2002, barely a year before Grynberg filed suit. Moreover, argued Grynberg, even if its causes of action could have been brought on July 24, 2000, when the first oil discovery in the Kashagan Field was publicly announced, the lawsuit was still filed within three years of that date. With regard to laches, Grynberg contended that because the lawsuit was brought within the time period established by the analogous statute of limitations, it would be barred by laches only if Shell could prove extraordinary circumstances, which it had not done.

Shell contended that Grynberg's claims accrued as soon as it knew (or should have known) the facts underlying its claims, and that this had occurred by 1993, or at the latest by 1997. According to Shell, Grynberg had acquired the necessary knowledge from the BP Litigation and from Mr. Grynberg's admitted reading of the 1993 Wall Street Journal article reporting that Shell, BP, Total, and others, had signed an agreement "to begin exploration of a potentially huge oil field in the Caspian Sea north of Iran." Shell Cross-Mot. Summ. J. at 8, March 6, 2006 (internal quotation marks omitted). And, Shell continued, Grynberg should have known the necessary facts from the news accounts on

the matter, its access to Kazakh officials, and its ability to contact Shell itself.

Responding to Grynberg's argument on laches, Shell said that it did not need to prove extraordinary circumstances because the suit was not filed within the analogous limitations period. Alternatively, it contended that extraordinary circumstances existed because (1) Grynberg had not filed suit until 13 years after Mr. Grynberg's only meeting with Shell, (2) Grynberg had admittedly lost "numerous boxes of important documents" pertaining to the lawsuit, and (3) the Shell representatives who had met with Mr. Grynberg and almost all those with personal knowledge of the material events were no longer Shell employees. Shell App. Vol. II at 474 (Shell Mem. of Law in Opp'n to Pls.' Mot. Summ. J. at 20, March 6, 2006).

Grynberg in turn replied that Shell had failed to show prejudice from delay, contending that Shell could still obtain the testimony of its former employees, but not addressing Shell's claims of prejudice from Grynberg's loss of important records.

The district court granted Shell summary judgment. It ruled that Grynberg was injured when Shell entered a consortium in 1993 in reliance on the information provided by Grynberg, or, at the latest, in 1997 when Shell and others planned commercial development of the Kashagan Field. The court also ruled that Grynberg should have discovered the requisite injury in November 1997, when newspapers reported that a consortium including Shell "had agreed to develop the Kashagan Field for commercial purposes." Mem. Op. & Order (on Summ. J.) at 7, 9, June 6, 2006. The court

concluded that Grynberg's breach-of-fiduciary-duty and unjust-enrichment claims were both barred under the three-year limitations period which applied "under the statute [of limitations] and the correlating laches doctrine." *Id.* at 1-2.

On June 16, 2006, Grynberg filed a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. It argued that the unjust-enrichment claim, which was governed by laches, was not untimely because the limitations period under the analogous statute of limitations was six years. The district court denied the motion on the ground that a party may not use a Rule 59(e) motion to raise new issues that could and should have been presented before entry of judgment.

B. Total

The exhibits submitted by Total in support of its motion for summary judgment were more extensive than those submitted by Shell. In addition to the Shell materials, Total submitted copies of the 1993 CA, the 1997 PSA, and the 1999 settlement agreement between Grynberg and BP (the BP Settlement Agreement) to resolve the BP Litigation. The 1999 BP Settlement Agreement states that BP, Shell, and Total, among others, were parties to a "Production Sharing Agreement in Respect of the North Caspian Sea, dated as of November 18, 1997, to Engage in Exploration and Production." Total App. Vol. VI at 1969. The Statement of Undisputed Material Facts in Total's motion asserts that the AMI set forth in Grynberg's 1990 letter to Total "matched, by latitude and longitude, the boundaries of the North Caspian Sea then claimed by and now defined to be

within Kazakhstan," and attached a sworn statement and map prepared by a cartographer. *Id.* Vol. V at 1462. This assertion was uncontested, as Grynberg's response (which would have been more appropriate in an answer to a complaint) states only that it "is without knowledge to admit or deny the boundaries of the North Caspian Sea then claimed by and now defined to be within Kazakhstan." *Id.* Vol. IV at 1040. A fact is "disputed" in a summary-judgment proceeding only if there is contrary evidence or other sufficient reason to disbelieve it; a simple denial, much less an assertion of ignorance, does not suffice. *See* Fed. R. Civ. P. 56(e); *Trevizo v. Adams*, 455 F.3d 1155, 1159-60 (10th Cir. 2006).

As in the Shell Case, Grynberg argued that its claims had not arisen until the Kashagan Field was declared commercial in 2002, because it had not been injured until then: if the exploratory wells had been dry, Grynberg reasoned, it "would have had nothing on which to claim an interest." Pls.' Cross-Mot. Summ. J. at 6, Dec. 16, 2005. At the earliest, argued Grynberg, the clock started on July 24, 2000, when the first oil discovery was publicly announced, still less than three years before it filed suit. In the alternative, Grynberg contended that even if it could have sued Total for entering the PSA in 1997, the limitations period did not begin to run on that claim until 2002, when it first obtained a copy of the PSA, because it had not known before then that Total itself was exploiting areas within the AMI. Grynberg asserted that the BP Settlement Agreement had not revealed which blocks of the Caspian Sea were being exploited by Total or whether Total had used confidential information from Grynberg. Grynberg also contended that both the breach-of-

fiduciary-duty claim and the unjust-enrichment claim were equitable claims governed by laches, and that Total had not established laches because suit had been brought within the analogous limitations period and Total had failed to prove prejudice from delay.

Total's legal theory was that Grynberg's causes of action accrued as soon as Grynberg knew or should have known that Total (1) had exploration and production rights, (2) within the AMI, (3) to the exclusion of Grynberg. According to Total, all three elements were satisfied by the time that Grynberg executed the BP Settlement Agreement on January 19, 1999, more than three years before Grynberg sued Total. In particular, the agreement stated that Total had production rights in the Kazakh sector of the North Caspian Sea, all of which, asserted Total, is within the AMI. Total further argued that Grynberg's claims had accrued even earlier, when Total's commercial interest in the AMI had been widely publicized in 1997. Total contended that although Grynberg's claim for unjust enrichment was governed by laches, Grynberg could overcome a laches bar only by showing extraordinary circumstances because it had filed suit outside of the analogous three-year limitations period. In a later pleading Total argued that claims for unjust enrichment are governed directly by the statute of limitations, but Total also contended that it was prejudiced by Grynberg's delay because it no longer employed certain key people, memories had faded, and it had lost track of relevant documents.

Grynberg replied that Total had not established prejudice, pointing out that (1) Total still employed most of the people involved in developing the Kashagan

Field, (2) it could not explain how it was prejudiced by the loss of documents because it could not describe their contents, and (3) it did not know whether an unlocated former employee would testify in its favor.

The district court granted summary judgment for Total, ruling that Grynberg's causes of actions accrued by 1999, when Grynberg should have known that Total had obtained production rights in the AMI to the exclusion of Grynberg. The court rejected Grynberg's argument that it could not have brought a claim before the Kashagan Field was declared commercial.

On June 16, 2006, Grynberg filed a motion to alter or amend judgment under Rule 59(e). It argued that its unjust-enrichment claim was governed by laches and that the limitations period under the analogous statute of limitations was six years, not three. The district court denied the motion because Grynberg was making a new argument that it could have previously raised. It also rejected the argument on the merits.

IV. DISCUSSION

We review a district court's decision to grant summary judgment de novo, viewing all facts in the light most favorable to the party opposing summary judgment. *See Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004). We will affirm a grant of summary judgment if there is no genuine dispute of material fact and the prevailing party is entitled to judgment under the law. *See id.* at 426; Fed. R. Civ. P. 56(c). Because the parties' arguments assume that Colorado law applies, we will proceed under the same assumption. *See St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs.*, 309 F.3d

680, 703 (10th Cir. 2002) (assuming that Oklahoma law applies because parties assumed that it did). We will first address Grynberg's claims for breach of fiduciary duty and then the unjust-enrichment claims. We hold that there is no genuine dispute regarding facts that establish that Grynberg's claims are time-barred.

A. Breach of Fiduciary Duty

The parties do not dispute that the limitations period for a claim of breach of fiduciary duty is three years from when the claim accrues. *See* Colo. Rev. Stat. § 13-80-101(1)(f). To establish a claim under Colorado law for breach of fiduciary duty, a plaintiff must prove (1) that it was justified in reposing trust or confidence in the other party, or that the other party invited, accepted, or acquiesced in that trust; (2) that the other party assumed a primary duty to represent the plaintiff's interest in a transaction; (3) that the nature and scope of the duty extended to the subject matter of the claim; and (4) that it was damaged by the trustee's breach of that duty. *See Equitex, Inc. v. Ungar*, 60 P.3d 746, 752 (Colo. Ct. App. 2002).

Although the fourth element refers to "damage," it does not require that the plaintiff actually be worse off; it also encompasses any benefit that the defendant wrongfully obtained. The Restatement (Second) of Torts § 874 cmt. b (1979) states that the remedies for breach of fiduciary duty include "restitutionary recovery," and cites, among other things, the Restatement (First) of Restitution §§ 138 and 190 (1937). Section 138(1) states that "[a] fiduciary who has acquired a benefit by a breach of duty as fiduciary is under a duty of restitution to the beneficiary." And §

190 states that "[w]here a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as fiduciary, he holds it upon a constructive trust for the other." In accord with the Restatements, the Colorado Uniform Jury Instruction for damages with respect to a claim for breach of fiduciary duty includes as a possible component of damages: "[a]nything of value or any profit the defendant . . . received as a result of the breach of fiduciary duty." Colo. Jury Instrs., Civil ch. 26:5(2)(a), (c) (4th ed. 2007); *see TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1182 (10th Cir. 2007) (noting that Colorado jury instructions are promulgated by state supreme court).

The Shell Complaint alleges that Shell "wrongfully us[ed] the confidential information imparted to Shell by Grynberg for its own use and profit to the exclusion of Grynberg." Shell Compl. at 24. The Total Complaint is essentially the same, alleging that "Total breached its fiduciary duty to Grynberg by wrongfully appropriating the confidential information [obtained from Grynberg] for its own use and profit to the exclusion of Grynberg." Total Compl. at 20. The only issue before us on appeal is when Grynberg knew or should have known that it could bring claims against the defendants for benefitting from the appropriation of the confidential information it had provided.

Grynberg's position on appeal appears to be that it had no cause of action until it knew that a defendant had a production interest in the specific area within the AMI that Mr. Grynberg had pinpointed to the defendants--namely, the Kashagan Field. This might follow if its claim had been solely that the defendant would breach a

duty to Grynberg if it used confidential information from Grynberg to obtain an interest in the Kashagan Field (as opposed to the entire AMI). But that was not Grynberg's theory below. Both complaints alleged that the involvement of Shell or Total anywhere in the AMI was a breach of fiduciary duty owed to Grynberg. Accordingly, whenever either defendant benefitted from involvement in the AMI, Grynberg could have brought its claim against that defendant for breach of fiduciary duty. It was on this basis that Grynberg sought 20% of the defendants' interests in the *entire* AMI. Grynberg did not argue during the summary-judgment proceedings that it had a claim against Shell or Total only if that defendant had an interest in the Kashagan Field. Nor did it argue below, as it does on appeal, that its claim is essentially one for misappropriation of a trade secret (the information that Grynberg allegedly conveyed regarding the Kashagan Field). We need not consider a legal theory raised for the first time on appeal. *See Carpenter v. Boeing, Co.*, 456 F.3d 1183, 1198 n.2 (10th Cir. 2006). Therefore, we examine only when Grynberg knew or should have known that Shell or Total had obtained a benefit from an interest somewhere in the AMI.

This examination is a two-part process. First we determine when the defendants obtained a benefit. Then we determine when Grynberg should have known of that benefit. Colorado has endorsed a broad view of benefit in the context of restitutionary recovery.

> "A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the

> request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. *The word 'benefit,' therefore, denotes any form of advantage.*"

Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass'n, 649 P.2d 1093, 1097 (Colo. 1982) (en banc) (emphasis added) (quoting Restatement (First) of Restitution § 1 cmt. b (1937)). By this standard it would seem that Shell and Total had received a benefit as soon as they entered their first consortium agreements with Kazakhstan in 1993. Both Shell and Total understandably thought that membership in the consortium was "advantageous" to them, something worth the obvious expenditures that would be required. But we need not resolve that matter. It is enough that participation in the 1997 PSA was a benefit to each of them. Grynberg's complaints allege the undeniable: "[O]n November 18 of 1997, Shell [, Total,] and others struck a deal with the Republic of Kazakhstan . . . to actually take oil and natural gas production from the Area of Mutual Interest, and to therefore profit immensely . . . ." Shell Compl. at 7; Total Compl. at 6. The 1997 deal was worth a fortune.

As for Grynberg's knowledge, in the Shell Case the district court ruled that newspaper articles established that Grynberg knew or should have known of the breach of fiduciary duty in 1993, when Shell's involvement in the exploratory consortium became public (and Grynberg knew that it was not a party to that consortium), or at the latest in 1997, when

newspapers reported that a consortium including Shell was going to exploit the Kashagan Field commercially. In the Total Case the court ruled that documents from the BP Litigation established that Grynberg knew or should have known in 1999 that Total had a commercial interest in the AMI. We address the Shell decision first, and then the Total decision.

1. Shell

In our view, there can be no dispute that Grynberg knew or should have known by the end of 1997 that Shell was a participant in the 1997 PSA. Mr. Grynberg admits that in 1993 he read a Wall Street Journal article stating that Shell and BP, among others, were involved in an exploratory consortium in Kazakhstan. Based on that article, he wrote a letter to BP exclaiming that their "hard work . . . ha[d] finally come through for all of us." Shell App. Vol. III at 1031. Articles published in 1997 in the New York Times, the Wall Street Journal, the Financial Times, and Europe Energy, among others, identified Shell as a member of a commercial consortium in Kazakhstan for oil exploration in an area that probably, if not certainly, overlapped the AMI. Two (in the New York Times and Europe Energy) mentioned the Kashagan Field by name, one (in the Financial Times) referred to the Kazakh Sector of the North Caspian Sea, and the others simply referred to the North Caspian Sea.

Grynberg argues that the articles are irrelevant because they contained "inconsistent and . . . insufficient detail" and he did not read them. Shell Aplt. Br. at 22. We disagree. First, Mr. Grynberg does not explain in what ways the articles were inconsistent or insufficient;

he merely asserts that they were. Yet all identify BP, Shell, and Total as parties to the commercial agreement, and all point to the North Caspian Sea (or more specifically the Kashagan Field) as a subject of the agreement. Second, it strains credulity that a person of Mr. Grynberg's self-described experience, expertise, and worldliness, with a financial interest worth millions of dollars, or even tens or hundreds of millions, could not, with reasonable diligence, learn of matters reported in the leading business newspapers circulated in this country. How could any reasonable person with Grynberg's expertise, resources, and financial interest have remained ignorant of an agreement relating to oil exploration in the Kazakh portion of the North Caspian Sea that was signed in Washington, D.C., in the presence of Mr. Grynberg's "friend" Nazarbaev and Vice President Gore? To the extent that any particular article did not provide complete information, it still would have caused a reasonable person in Grynberg's position to pursue the matter, eventually obtaining the publicly available information that Shell was party to a production-sharing agreement with respect to oil and gas reserves in the AMI. Grynberg contends that a jury might have believed that it exercised reasonable diligence, but we disagree that a *rational* jury could have reached that conclusion. *See Carpenter*, 456 F.3d at 1192 (issue is genuine only if a reasonable jury could find in nonmovant's favor).

Colorado case law supports the view that sophisticated business people can be expected to check public information. In *Skyland Metropolitan District v. Mountain West Enterprise*, LLC, 184 P.3d 106 (Colo. Ct. App. 2007), the court held that claims by developers

challenging the assessment of fees against their property were time-barred. The relevant information on which the claims were based had been "publicly available and obtainable in the exercise of reasonable diligence," particularly in light of the developer's experience and sophistication. *Id.* at 127. Also, more generally, several of our sister circuits have held that "'[w]here events receive . . . widespread publicity, plaintiffs may be charged with knowledge of their occurrence.'" *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (quoting *United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980)). *Accord Patterson v. United States*, 451 F.3d 268, 271 (1st Cir. 2006) (cause of action accrued when FBI's involvement in plaintiffs' father's death received widespread publicity); *In re Briscoe*, 448 F.3d 201, 223-24 (3d. Cir. 2006) (plaintiffs had a "reasonable opportunity to discover the alleged wrong" due to "extensive publicity" regarding dangerous diet drugs that injured them (internal quotation marks omitted)); *Fulcher v. United States*, 696 F.2d 1073, 1077 (4th Cir. 1982) ("prudent landowner exercising reasonable diligence should . . . have discovered the government's open and notorious occupation of the land" because of "extensive publicity and discussion.").

Grynberg cites cases in which general publicity was held inadequate to establish that a plaintiff should have known of the cause of action, but the cases are readily distinguishable because of the lack of expertise of the plaintiff or imprecision of the public information. In *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1383 (10th Cir. 1985), the plaintiffs sued a uranium mill for wrongful death, alleging that the mill had caused leukemia that killed their children and spouses. We held

that "the mere fact that there were public statements concerning the possible link between radiation and leukemia is not enough to establish, as a matter of law, that the plaintiffs should have known that emissions from the uranium processing plant . . . were the likely cause of the leukemia." *Id.* at 1388. "Nor can it be said," we added, "that [as a matter of law] the average layman would understand, after reading that fall-out from atomic bombs causes cancer, that the local uranium mill may have caused . . . leukemia." *Id.* Further supporting this court's holding was that the doctors who had been consulted by the plaintiffs' decedents did not correlate the leukemia with the mill. *See id.* at 1389. No similar scientific uncertainty or lack of expertise hampered Grynberg. *See also Alexander v. Oklahoma*, 382 F.3d 1206, 1216 n.4 (10th Cir. 2004) (distinguishing *Maughan* on similar grounds).

Even easier to distinguish is *Cook v. Rockwell International Corp.*, 755 F. Supp. 1468, 1476, 1483 (D. Colo. 1991), which held that publicity about pollution at Rocky Flats was insufficient to notify plaintiffs that their property was polluted and they had been exposed to hazardous substances; there was no evidence regarding when the plaintiffs should have known that this pollution had extended to their properties, some of which were six miles from Rocky Flats.

Grynberg also cites two other cases apparently to support its position on this issue, but it provides no analysis or discussion. In the first, *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1143 (9th Cir. 2002), plaintiffs alleged that they had been harmed by exposure to radioactive and nonradioactive substances released from rocket-testing facilities. Boeing argued

that plaintiffs' claims were time-barred because there had been general publicity regarding cancer and specific publicity regarding Boeing's facilities. The court held that this publicity was not sufficient to put plaintiffs on notice that Boeing caused their cancer, because the extent of publicity was unclear, there were multiple possible causes for their illnesses, and, as in *Maughan*, the plaintiffs were under the care of doctors who did not make the connection between their cancers and the defendant's facilities. *See id.* at 1151-55. In the second case, *Williams v. Stewart*, 2005 NMCA 61, 137 N.M. 420, 112 P.3d 281, 283-84 (N.M. Ct. App. 2005), plaintiffs were family members of decedents whose organs had been removed and tested by the Los Alamos National Laboratory for plutonium content, without the informed consent of the decedents or their families. The Laboratory argued that plaintiffs' claims accrued when the plutonium-testing program received publicity, but the appellate court ruled that whether plaintiffs were diligent was a question of fact. *Id.* at 286-87. The court noted questions concerning which publications would have been widely circulated where the plaintiffs lived and that many of the articles omitted the important information (such as the failure to obtain informed consent) that would have alerted the plaintiffs to their claims. In contrast, the publicity related to the PSA was sufficiently specific and widely circulated that a reasonable person with Grynberg's expertise and financial stake would have been adequately informed.

Finally, Grynberg cites two readily distinguishable Colorado opinions that do not concern the effect of widespread publicity. In *Salazar v. American Sterilizer Company*, 5 P.3d 357, 362-64 (Colo. Ct. App. 2000), the court ruled that Salazar's cause of action did not accrue

until a toxicological report diagnosed her peripheral neuropathy as being caused by ethylene oxide, even though prior doctors had told her that the chemical was a possible cause. *Salazar* is inapposite because, like the cancer cases discussed above, it involved an unsophisticated layperson. The second case, *Financial Associates, Ltd. v. G.E. Johnson Construction Co., Inc.*, 723 P.2d 135, 138-40 (Colo. 1986) (en banc), was a suit alleging a design defect. Various expert reports stated that the damage to the plaintiff's building had several possible causes, but a design defect was not mentioned. The court held that the cause of action did not necessarily accrue before the plaintiff received a report attributing the damage to the design defect. We fail to see any help for Grynberg in this decision.

2. Total

In the Total Case the district court ruled that there was no genuine issue of disputed fact that Grynberg's cause of action accrued by the time of the BP Settlement Agreement in 1999 because the text of the agreement revealed that Total, among others, had entered a production sharing agreement with respect to the North Caspian Sea in Kazakhstan. The court stated that "the AMI . . . covers the entire Kazakh sector of the North Caspian Sea and, therefore, the area referenced in the PSA as the 'North Caspian Sea' necessarily falls within the areas covered in the AMI." Order on Mots. for Summ. J. at 13, May 31, 2006. We agree. Moreover, we have already held that the 1997 news articles showed that Grynberg should have known of its cause of action against Shell, and these articles were also produced by Total and mention Total's involvement as much as Shell's.

Grynberg argues that it did not realize in 1999 that Total had an interest specifically in the Kashagan Field. But, as we have already explained, such knowledge was not necessary for Grynberg's cause of action. The precise location of Total's interest within the AMI was irrelevant.

Grynberg further contends that a reasonable jury could conclude that it was diligent in its efforts to learn of Total's involvement in the region. It argues that it had no duty to ask Total whether it was involved in the AMI because it was entitled to trust Total based on their fiduciary relationship, even though it had not communicated with Total since 1990. But diligence is not at issue because by the time of the 1999 BP Settlement Agreement, Grynberg had all the information it needed to bring its cause of action; further investigation was unnecessary.

Grynberg also argues that Total engaged in fraudulent concealment to prevent him from learning of Total's breach of fiduciary duty. Fraudulent concealment tolls the statute of limitations. *See First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197, 1200 (Colo. 1989) (en banc). But in district court Grynberg merely asserted such fraud, providing no evidence, or even argument, on the point. "[W]here an issue is raised but not pursued in the trial court, it cannot be the basis for the appeal." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993).

B. Unjust Enrichment

Grynberg's unjust-enrichment claims against Shell and

Total were dismissed as barred by the statute of limitations and the doctrine of laches. Unjust enrichment occurs when "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for the defendant to retain the benefit . . . ." *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000) (en banc). As we understand Grynberg's complaints, the unjust-enrichment claims are predicated on the same alleged misconduct--a breach of fiduciary duty, primarily arising from the use of confidential information--as the breach-of-fiduciary-duty claims. This is a well-established type of unjust-enrichment claim. *See* Restatement (Third) of Restitution § 43 (Tentative Draft No. 4, 2005) (discussing unjust-enrichment claims based on breach of fiduciary duty). Indeed, it appears to us that Grynberg's unjust-enrichment claims are identical to its breach-of-fiduciary-duty claims. There is no practical difference between (1) a tort claim for breach of a fiduciary duty in which the plaintiff seeks disgorgement of (or a constructive trust on) profits or property and (2) an unjust-enrichment claim in which the enrichment is claimed to be unjust because it was accomplished through a breach of fiduciary duty. *See* Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1222-26 (1995) (Although recognizing that there is no practical difference, the author emphasizes that in this context unjust-enrichment doctrine provides a conceptual basis for a substantive claim of wrongful retention of a benefit and does not merely provide an additional means of recovery for the tort.); *cf. Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1006-08 (Colo. 2008) (en banc) (governmental immunity from actions in tort encompasses unjust-enrichment claim arising out of

tortious conduct). As do the parties, however, we will treat the claims separately.

The parties dispute when the defendants received the benefit that would establish Grynberg's claim of unjust enrichment. The defendants contend that the requisite benefit would be a valuable interest in the AMI. Grynberg contends that (1) the defendants' interest would have to be a production interest located specifically in the Kashagan Field and (2) that interest would not be unjustly retained by a defendant until the defendant began receiving profits that would have to be shared with Grynberg under their 1990 agreements. We agree with Shell and Total.

First, as previously discussed in relation to Grynberg's breach-of-fiduciary-duty claims, Grynberg's complaints can only be read as claiming an entitlement to a share of the defendants' benefits throughout the entire AMI, not just the Kashagan Field. The theory of the complaints is that any involvement of the defendants in the AMI is an exploitation of their breach of a fiduciary duty--the use of confidential and valuable information provided by Grynberg. Thus, the unjustly retained interest need only be somewhere within the AMI; it is not restricted to the Kashagan Field.

Second, any benefit retained by Shell or Total in the AMI would constitute unjust enrichment. Under Colorado law, in this context a benefit is "'any form of advantage.'" *Cablevision*, 649 P.2d at 1097 (quoting Restatement (First) of Restitution § 1 cmt. b). Grynberg argues that the defendants would not have done anything improper--and therefore would not be unjustly enriched--until they refused to pay Grynberg

as required by their 1990 agreements, namely, when they started receiving profits from production of oil and gas in the AMI. But that analysis would be proper only if Grynberg were suing for breach of contract. If it were, one could say that a breach has not occurred until a defendant has not performed under the contract, and neither Shell nor Total owed any duty of performance until it started earning profits from production. Grynberg's complaints, however, do not allege breach of contract. They allege unjust enrichment, and the benefit to a defendant is what matters, not the breach of a promise to pay that is not the basis of the claim. The defendants were unjustly enriched, according to the theory of the complaints, when they obtained a benefit by appropriating Grynberg's confidential information and efforts. Accordingly, Grynberg had an unjust-enrichment claim when Shell or Total obtained a benefit--a valuable interest--in the AMI. And, as we explained in discussing the breach-of-fiduciary-duty claims, Shell and Total certainly had such an interest when they executed the PSA in 1997.

The traditional rule for equitable claims, such as a claim for unjust enrichment, is that timeliness is determined under the doctrine of laches. *See Interbank Invs., LLC v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224, 1229-30 (Colo. Ct. App. 2000). The elements of laches in Colorado are: "(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another." *Manor Vail Condo. Ass'n v. Vail*, 199 Colo. 62, 604 P.2d 1168, 1170 (Colo. 1980) (en banc) (internal quotation marks omitted). But the traditional rule must yield to legislative authority and may yield, at least in part, to legislative policy. As we proceed to explain, the

Colorado statute of limitations may well be itself controlling in this case, either on its own or in conjunction with established doctrine. And even if the statute is not controlling, the Colorado rule that would then apply requires dismissal of Grynberg's claims.

First, Colorado's three-year statute of limitations on its face applies to Grynberg's restitutionary claim. It states:

> The following civil actions, *regardless of the theory upon which suit is brought*, or against whom suit is brought, should be commencedwithin three years after the cause of action accrues, and not thereafter:
>
> . . .
>
> (f) All actions for breach of trust or breach of fiduciary duty

Colo. Rev. Stat. § 13-80-101(1) (emphasis added). *See Hersh Companies Inc. v. Highline Village Assocs.*, 30 P.3d 221, 223-24 (Colo. 2001) (en banc) (whether claim falls within statute-of-limitations provision depends on nature of the claimed right, not the form of action or relief sought). Because Grynberg's unjust-enrichment claims are founded on allegations of breach of fiduciary duty, the claims are encompassed by the statute. Although one might try to argue that the statutory provision governs only actions at law, not suits in equity, the language "regardless of the theory upon which suit is brought" undermines the argument.

Second, even if the statute explicitly applied only to

actions at law, compelling authority would require application of the statute here because the only difference between Grynberg's legal and equitable claims is the relief sought. In *Cope v. Anderson*, 331 U.S. 461, 463-64, 67 S. Ct. 1340, 91 L. Ed. 1602 (1947), the Supreme Court wrote:

> Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which gives equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy.

See Douglas Laycock, Modern American Remedies 1003 (3d. ed. 2002) (describing this "concurrency" doctrine and providing the example of a suit for breach of contract and a suit for specific performance, which seek two remedies for the same substantive wrong, a breach of contract). If the legislature has determined that three years is sufficient time to sue for a breach of fiduciary duty, that determination could be undermined by permitting less timely claims for such breach when only equitable remedies are sought.

Third, even if the statute is not controlling, the Colorado law that would then apply still gives great weight to the statutory period. A recent decision of the Colorado Court of Appeals stated the following rule: "Absent extraordinary circumstances, . . . a court '"will usually grant or withhold relief in analogy to the statute of limitations relating to actions at law of like

character."'" *Interbank*, 12 P.3d at 1230 (quoting *Brooks v. Bank of Boulder*, 911 F.Supp. 470, 477 (D. Colo. 1996) (quoting *Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945)). To be sure, as Grynberg argues, we are not bound by decisions of state intermediate appellate courts when we apply state law in a diversity case; rather, we are to follow decisions of the state's highest court, or, when none is in point, predict how it would rule on the issue. *See Pompa v. Am. Family Mut. Ins. Co.*, 520 F.3d 1139, 1142 (10th Cir. 2008). But *Interbank* is not contrary to any Colorado Supreme Court decision, and we see no reason to believe that the state supreme court would adopt a rule more favorable to Grynberg than the *Interbank* rule. *See Stickley v. State Farm Mut. Auto Ins. Co.*, 505 F.3d 1070, 1077 (10th Cir. 2007) (we will not disregard an intermediate state court's decision unless we are "convinced by other persuasive data that the highest court of the state would decide otherwise."). The *Interbank* rule is in accord with a "modern view" that in litigious times, certainty is a virtue. Rather than making an individualized assessment of the laches factors in each case, a court can rely on a precise statute of limitations for analogous claims, although--after all, we are dealing with equitable relief--extraordinary circumstances may provide an avenue of escape. *See generally*, Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 BYU L. Rev. 917, 952-54 (1992). Thus, if Grynberg cannot survive application of the *Interbank* rule, his claims would surely be doomed under Colorado Law.

The first step under *Interbank* is to determine whether the claim would be untimely under the statute of limitations for analogous claims--here, the three-year

period under Colo. Rev. Stat. § 13-80-101(1)(f). We have already made that determination. As we concluded in our discussion on the breach-of-fiduciary-duty claims, that limitations period ran before Grynberg filed suit. Under *Interbank*, our next step would ordinarily be to consider whether Grynberg has proved that extraordinary circumstances justify the tardy filing of his lawsuits. But Grynberg has failed to allege extraordinary circumstances. We therefore rule that his unjust-enrichment claims are barred as untimely.

We reject Grynberg's argument that we must apply the six-year statute-of-limitations period set forth in Colo. Rev. Stat. § 13-80-103.5(1)(a). The argument was raised for the first time in postjudgment Rule 59(e) motions, and we have held that such motions cannot be used to "advance arguments that could have been raised in prior briefing." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

We also reject Grynberg's argument that the district court in the Shell Case did not apply the proper accrual provision, and his argument in both cases that his cause of action for unjust enrichment may not yet have accrued; both these arguments were raised for the first time on appeal. *See Carpenter*, 456 F.3d at 1198 n.2 (we will generally not consider arguments raised for the first time on appeal). Also, we need not address Grynberg's contentions that both district judges did not view the evidence in the light most favorable to it, that the district court made an impermissible credibility determination in the Total Case, and that both district judges incorrectly analyzed the elements of laches. Our review has been de novo and does not repeat the district judges' alleged errors.

V. CONCLUSION

We AFFIRM both grants of summary judgment. We DENY Appellants' Motions for Certification of Questions of Law Pursuant to 10th Cir. R. 27.1.

Civil Case No. 03-cv-01212-LTB-PAC
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JACK J. GRYNBERG and GRYNBERG PRODUCTION CORPORATION and its successors, GRYNBERG PETROLEUM COMPANY and its successors,
Plaintiffs,

v.

SHELL EXPLORATION B.V., and SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. f/k/a SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.,
Defendants.

June 6, 2006, Decided
June 6, 2006, Filed

COUNSEL: For Jack J. Grynberg, Grynberg Production Corporation, and its successors, Grynberg Petroleum Company, and its successors, Plaintiffs: Roger Allan Jatko, Linda Ann Battalora, Grynberg Petroleum Company-Greenwood Village, Greenwood Village, CO; Michael S. Porter, Michael S. Porter, Atty at Law, Wheat Ridge, CO.

For Royal Dutch Petroleum Company, Shell Transport and Trading Company, P.L.C., Shell Petroleum N.V., Shell Exploration B.V., Shell International Exploration and Production B.V., formerly known as, Shell Internationale Petroleum Maatschappij B.V., Defendants: Graham Kerin Blair, Baker & McKenzie-

Houston, Houston, TX; John Frederic Shepherd, Holland & Hart, LLP-Denver CO, Denver, CO; Phillip B. Dye, Jr., Vinson & Elkins, LLP-Houston Texas, Houston, TX.

MEMORANDUM OPINION AND ORDER

Lewis T. Babcock, Chief Judge

Babcock, C.J.

The defendants, Shell Exploration B.V. ("Shell Exploration") and Shell International Exploration and Production B.V. f/k/a Shell International Petroleum Maatschappij B.V. ("Shell International"), and the plaintiffs, Jack J. Grynberg ("Grynberg"), Grynberg Production Corporation ("Grynberg Production"), and Grynberg Petroleum Company ("Grynberg Petroleum"), have filed cross motions for summary judgment on the questions whether the plaintiffs' claims -- unjust enrichment and breach of fiduciary duty -- are barred by the statute of limitations and the doctrine of laches. The motions are adequately briefed and oral argument would not materially aid their resolution. For the reasons stated below, I DENY the plaintiffs' motion and GRANT the defendants' motion.

The plaintiffs initiated this action on July 3, 2003. The parties agree that the applicable period of limitation -- under the statute and the correlating laches doctrine -- is three years, but disagree on when the limitations period commenced. The parties also agree that Colorado law governs the plaintiffs' claims. The material facts are undisputed; only their legal significance remains to be determined.

I. Facts

In July, 1990, Mr. Grynberg met with Yorck H. de Heer, legal counsel to Shell International and Shell Exploration, to discuss exploration and possible exploitation of the Kashagan Field, a potential oil field in the Caspian Sea within the jurisdiction of Kazakhstan. (Mr. Grynberg also claims to have discussed the project with P.E.R. Lovelock, a former geological advisor for Shell International, but Mr. Lovelock denies it.) Mr. Grynberg was acquainted with Nursultan A. Nazarbaev, President, of Kazakhstan and former First Secretary of the Communist Party of Kazakhstan SSR ("Nazarbaev") and intended to assemble a consortium of enterprises to render the Kashagan Field profitable in cooperation with the Kazak government. He anticipated that the defendants would be interested in the venture and communicated to Mr. De Heer geological and seismic data concerning the Kashagan Field, which he had obtained from Kazak sources. In exchange, Mr. Grynberg expected to receive a "carried interest," which would consist of 20% of the defendants' earnings from the Kashagan Field less costs and expenses. No written agreement embodying these terms appears in the record, but Mr. Grynberg maintains that the defendants assented "in principle."

On June 9, 1993, Kazakhstan and several oil companies, including Shell Exploration, entered into a Preliminary Consortium Agreement ("PCA"). The plaintiffs were not parties to the PCA. The parties agreed in the PCA to negotiate the terms of a consortium agreement, which would govern environmental and seismic research, prerequisite to exploration for oil in the Kashagan Field. The PCA contained no provision for

exploratory drilling or production of hydrocarbon products. The PCA did not grant to Shell Exploration or the other oil companies rights to develop the Kashagan Field for commercial purposes.

The PCA received contemporary press in the *Los Angeles Times*, *The New York Times*, and *Financial Times* (of London). Though the press did not mention the Kashagan Field by name, the articles disclosed that participants, including the defendants, would survey an area "in the Caspian Sea," the "Caspian Shelf," and "Kazakhstan's entire shelf in the North Caspian." *Financial Times* reported, "No matter what is found, no oil is expected from the shelf before the turn of the century."

On June 10, 1993, *The Wall Street Journal* reported the execution of the PCA. The article mentioned that Royal Dutch/Shell Group, among others, was participating in formation of the proposed consortium and quoted oil executives as stressing that the field's potential was not yet estimated and that the agreement was only for "exploration." Mr. Grynberg read the article, from which he surmised that the signatories to the PCA had agreed to assemble a "study consortium" for the purpose of conducting geological and environmental surveys, and would agree to the terms of production if any oil was found. He wrote a letter to the Vice President of British Gas Corporation, a signatory to the PCA, expressing his congratulations and his expectation that he would participate in any profit. He wrote, "I am delighted it has finally come through for all of us. Based on the article in today's *Wall Street Journal* let's hope this effort will result in the discovery of the world's greatest oil accumulation."

On December 3, 1993, the parties to the PCA, including Shell Exploration, executed a Consortium Agreement, finalizing the terms on which the seismic survey and other research would proceed. Like the PCA, the Consortium Agreement contained no license to exploit the territory for commercial ends. *The New York Times* reported that the signors had agreed "to explore for oil in the northern part of the Caspian Sea shelf." *Lloyd's List* reported that exploration would occur in the "Kazakhstan sector of the Caspian Sea" and referred to the PCA governing studies "on the Caspian shelf." The correspondent speculated that development and production would "possibly" commence "after the year 2000."

On November 18, 1997, after completion of the requisite surveys and studies, the parties to the Consortium Agreement entered into a Production Sharing Agreement ("PSA"), settling the terms by which they would exploit the resources of the Kashagan Field. By the PSA, Kazakhstan granted to Shell Kazakhstan Development B.V. and other energy companies a license to "use underground resources for exploration and production of hydrocarbons" within the designated territory for specified, renewable periods of time. The oil companies assented to minimum expenditures on drilling and exploration. The PSA delineates the boundaries of the areas to be explored, specified to the latitudinal and longitudinal minute.

Over the ensuing days, reports of the PSA appeared in periodicals, including *Financial Times*, *Lloyd's List*, and *Oil & Gas Journal*. On November 18, 1997, *The New York Times* reported that President Nazarbaev was in Washington, D.C. to approve two "long-awaited

energy deals." One of the deals, the paper proclaimed, covered "the Kashagan field in the Caspian Sea, part of a vast offshore tract that seismic studies indicate may be the largest single oil deposit so far found in the Caspian Sea Basin." The article cautioned that, while geologic features of the field offered promise, the oil companies would "not know precisely what is contained beneath Kazakhstan's north Caspian shelf until drilling begins." The report identified the signatories to the deal, including "Shell." Other periodicals also mentioned the Kashagan Field by name or gave the approximate location of the exploration. The participants in the deal were widely announced.

On November 24, 1997, *Oil & Gas Journal* disclosed that participants in the venture had completed a seismic survey and were prepared to begin drilling exploratory wells. It quoted a participant's prediction that the first well would be drilled in 1998 and that development and production would occur some time later.

Mr. Grynberg concedes that he knew as early as June, 1993 that the defendants and others were venturing in the Caspian Sea. Though he insists that he did not know specifically where the exploration was occurring, he admits that the Kashagan Field was the only possibility located in the Caspian Sea. Over the months following execution of the PSA, Mr. Grynberg made unsuccessful efforts to obtain information about the project and the terms on which it was proceeding. He contacted representatives of Kazakhstan, Chevron, and British Petroleum, whom his entreaties failed to move. He suspected that the defendants had appropriated his allegedly confidential information, but did not attempt

to contact anyone at Shell Exploration, Shell International, or affiliated Shell entities.

Following execution of the PSA, Mr. Grynberg attempted for several months without success to access the document. He obtained a copy in January, 2002 from the Barrows Company, which had published it. From the PSA, Mr. Grynberg confirmed that Shell Exploration and other petroleum companies were exploring in the Kashagan Field and that they had discovered oil in the middle of the territory he had years earlier identified. He then filed lawsuits against these defendants and other entities with which he had purportedly shared confidential information.

II. Discussion

It is beyond dispute that the claims accrued, and the three-year limitations period commenced, when Mr. Grynberg and the plaintiffs knew or had reason to know of the existence and cause of the injury which is the basis of their action. Colo. Rev. Stat. § 13-80-108(1); *Anderson v. Somatogen, Inc.*, 940 P.2d 1079, 1083 (Colo. Ct. App. 1996), *cert. denied*, (1997); *Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004), *cert. denied*, 544 U.S. 1044, 125 S. Ct. 2257, 161 L. Ed. 2d 1080 (2005). The plaintiffs had reason to know of their injury when they should have discovered it through the exercise of reasonable diligence. *Anderson*, 940 P.2d at 1083; *Industrial Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994).

Resolution here requires precision. It matters what injury the plaintiffs claim to have suffered. If, as the

defendants argue, the plaintiffs were injured when Shell Exploration used Mr. Grynberg's purportedly confidential information to solicit Kazak sanction, then the claims here accrued on June 9, 1993, or at the latest on December 3, 1993, when reports of a consortium assembled without Mr. Grynberg's involvement circulated in the international press. If the injury occurred when the oil companies agreed with Kazakhstan to exploit the Kashagan Field, then the claims accrued when Mr. Grynberg through the exercise of reasonable diligence should have discovered the existence of the PSA. If, as the plaintiffs argue, the injury was inchoate until the oil partners declared the Kashagan Field commercial on June 28, 2002, then the claims are timely.

Demonstration of a fiduciary duty to preserve confidential information, the duty the defendants are alleged to have breached here, requires proof "that a special trust or confidence was in fact reposed, that its reposition was justifiable, and that the other party either invited or ostensibly accepted the trust imposed." *First Nat. Bank of Meeker v. Theos*, 794 P.2d 1055, 1061 (Colo. Ct. App. 1990). A fiduciary breaches the duty when he discloses the confidential information to a third party. *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755, 757 (Colo. Ct. App. 1988). For that reason, the injury resulting from a breach of fiduciary duty, triggering accrual of the claim, is the violation of trust, not any attendant financial harm. Colo. Rev. Stat. § 13-80-108(6) ("A cause of action for breach of any express or implied contract, agreement, warranty, or trust shall be considered to accrue on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence."); *Polk v. Hergert*

Land & Cattle Co., 5 P.3d 402, 405 (Colo. Ct. App. 2000). The plaintiffs were injured not when they suffered economic consequences, but rather when Shell Exploration contracted with the consortium in reliance upon and with the assistance of the information Mr. Grynberg imparted to Mr. de Heer. *Compare, Lucas v. Abbott*, 198 Colo. 477, 601 P.2d 1376, 1378 (Colo. 1979) ("An action on any trust accrues at such time as the claimant attains, or reasonably could have attained, notice of the trustee's use of the trust property in a manner which is inconsistent with the claimant's interest.") Mr. Grynberg knew of that breach on June 10, 1993, more than ten years before he filed this action. At the very latest, periodical reports in November, 1997 explicitly proclaimed that the consortium had agreed to develop the Kashagan Field for commercial purposes, and Mr. Grynberg concedes that he then suspected the defendants of having dealt directly with Kazakhstan. It is undisputed that Mr. Grynberg did not at that time or over the ensuing years attempt to contact the defendants or their corporate affiliates.

The plaintiffs argue that their fiduciary duty claim could not have accrued until they suffered monetary damages, which, they assert, occurred when the Kashagan Field was on June 28, 2002 designated as a commercial discovery under the PSA. Until that time, they protest, they suffered no loss and were deprived of no profit share. However, a claim for breach of confidentiality does not require proof of economic loss; the injury is the disclosure of protected information. Indeed, the purpose of such a claim is to remedy not a lost contractual expectation but rather the loss of secrecy.

Grant v. Pharmacia & Upjohn Co., 314 F.3d 488, 493 (10th Cir. 2002) is particularly instructive on this point. The court in that case determined that the plaintiffs' claim for breach of fiduciary duty accrued on the date the plaintiffs learned of the breach. The court rejected the plaintiffs' argument that the claim did not accrue until damages later accrued because "uncertainty as to the precise extent of damage neither precludes the filing of a suit nor delays the accrual of a claim for purposes of the statute of limitations." *Grant*, 314 F.3d at 493 (*quoting Broker House Intern., Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. Ct. App. 1998)).

Patterson v. BP America Production Co., P.3d , 2006 Colo. App. LEXIS 627, 2006 WL 1171957 (Colo. Ct. App. 2006) is not contrary. That case consisted of a claim for breach of contract, which accrued when the claimant had reason to believe that the defendant had breached the contract.

Similarly, the plaintiffs' claim for unjust enrichment accrued more than three years before July 3, 2003. "In Colorado, a plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." *Salzman v. Bachrach*, 996 P.2d 1263, 1265-1266 (Colo. 2000). The Restatement, which the Colorado Supreme Court has adopted, explains that the benefit is anything that adds to the defendants' security or advantage and can consist of, among other things, an interest in money, land or chattels. Restatement of Restitution § 1, comment b (1937); *Cablevision of Breckenridge, Inc. v. Tannhauser Condominium Ass'n*, 649 P.2d 1093, 1097 (Colo. 1982).

The plaintiffs argue that the defendants did not realize any benefit until June 28, 2002, when the parties to the PSA declared the Kashagan Field commercial. This, however, is too narrow an understanding of the term "benefit." As the Federal Circuit has determined, the acquisition of exclusive rights, such as those that the defendants enjoy under the PSA, is a benefit under Colorado restitution law. *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 342 F.3d 1298, 1310 (Fed. Cir. 2003), *cert, denied sub nom., Wyeth Holdings Corp. v. University of Colorado Foundation, Inc.*, 541 U.S. 988, 124 S. Ct. 2028, 158 L. Ed. 2d 493 (2004). In addition to any profit that might result, possession of a share of rights under the PSA entitles the possessor to exclude non-contracting parties from exploitation of the Kashagan Field. This right has value as between the defendants and the plaintiffs. Indeed, Mr. Grynberg complains chiefly of his exclusion from the consortium, which he believes he was authorized to assemble. Also, the defendants' share in the PSA has market value. Though the PSA provides that shares in the consortium are assignable only under certain conditions, the shares are not inalienable. And parties to the PSA may, within limits, encumber their interests in the PSA as collateral for the financing of their obligations under the PSA.

It is clear, then, that the plaintiffs' claim for unjust enrichment accrued when Mr. Grynberg should have discovered Shell's interest in the Kashagan Field through the exercise of reasonable diligence. Mr. Grynberg concedes that he made no effort to contact the defendants or their representatives or affiliates after learning of the PSA. Though he denies having read the articles concerning the execution of the PSA in

1997, he does not deny that he was aware of the PSA in the 1990's. Indeed, he claims to have contacted officials of oil companies known to be parties to the PSA (none from Shell) and of Kazakhstan.

Recasting the same argument, the plaintiffs assert that their injury was speculative until June of 2002; their claim for 20% of the defendants' earnings from the Kashagan Field, less costs and expenses, was meaningless until the defendants realized earnings from which their share could be calculated. However, the plaintiffs have stated no such claim. Should the plaintiffs succeed on their claim of unjust enrichment, their recovery would be not expectation damages but rather restitution of any benefit conferred at their expense. *DCB Const. Co. v. Central City Dev. Co.*, 965 P.2d 115, 118-119 (Colo. 1998); *University of Colorado Foundation*, 342 F.3d at 1310-1312. "A party who has been unjustly enriched generally must make restitution to the other party by returning that party to the position it previously occupied." *Interbank Investments, LLC v. Eagle River Water and Sanitation Dist.*, 77 P.3d 814, 816 (Colo. Ct. App. 2003) ("*Interbank II*").

Interbank Investments, L.L.C v. Vail Valley Consol. Water Dist., 12 P.3d 1224, 1228 (Colo. Ct. App. 2000) ("*Interbank I*") does not change this result. In that decision, the Colorado Court of Appeals determined that the date of accrual of the plaintiff's claim for breach of contract was not the date on which the defendants first benefitted from the plaintiffs expenditures but rather the date on which the defendants were first obligated to reimburse the plaintiff. The determination of the accrual date, therefore, turned on the question of the parties' rights and obligations under their express

agreements. *Id.* at 1229. It is clear, then, that despite the court's references in dicta to the plaintiff's unjust enrichment claim, the decision did not settle the issue when that claim might have accrued. That inference is bolstered by the court's decision in *Interbank II* in which, on appeal after remand of *Interbank I*, the court determined that the plaintiff's unjust enrichment claim was precluded by the express contracts covering the subject matter. *Interbank II*, 77 P.3d at 816.

Accordingly, it is ORDERED that

1) the plaintiffs' motion to file supplemental authorities [172] is GRANTED;

2) the plaintiffs' motion for partial summary judgment [116] is DENIED;

3) the defendants' motion for summary judgment [122] is GRANTED; and

4) judgment shall enter for the defendants on all claims with costs

Dated: June 6, 2006, in Denver, Colorado.

BY THE COURT:

Lewis T. Babcock, Chief Judge

Civil Action No. 03-D-1280 (BNB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JACK J. GRYNBERG, GRYNBERG PRODUCTION CORPORATION, and its successors, and GRYNBERG PETROLEUM COMPANY, and its successors,
Plaintiffs,

v.

TOTAL COMPAGNIE FRANCAISE DES PETROLES, TOTAL FINA ELF S.A., and TOTAL S.A., Defendants.

May 31, 2006, Decided
May 31, 2006, Filed

COUNSEL: For Jack J. Grynberg, Grynberg Production Corporation, and its successors, Grynberg Petroleum Company, and its successors, Plaintiffs: Linda Ann Battalora, Roger Allan Jatko, Grynberg Petroleum Company-Greenwood Village, Greenwood Village, CO; Michael S. Porter, Michael S. Porter, Atty at Law, Wheat Ridge, CO.

For Total S.A., Defendant: Christopher R. Hart, Jennifer Lee Price, John Preston Bowman, William D. Wood, Fulbright & Jaworski, LLP-Houston, Houston, TX; Robert Paul Thibault, Patton Boggs, LLP-Denver Colorado, Denver, CO.

JUDGES: Wiley Y. Daniel, U. S. District Judge.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND

THIS MATTER is before the Court on several pending motions including three motions for summary judgment filed on September 16, 2005, by Defendants Total Compagnie Francaise Des Patroles, Total Fina Elf S.A., and Total S.A. (hereinafter referred to as "Total") (docket # 's 200/204, 201, and 202); a cross-motion for summary judgment filed by Plaintiffs Jack J. Gyrnberg, Grynberg Production Corporation, and Grynberg Petroleum Company (hereinafter referred to as "Grynberg" or "Plaintiffs") on December 20, 2005 (docket # 266); and Grynberg's Fed. R. Civ. P. 72(a) Objections to and Appeal of Magistrate Judge Boland's April 3, 2006, Order, filed April 18, 2006 (docket # 324). A hearing concerning these motions was held on May 12, 2006.

In this case, Grynberg, through the First Amended Complaint, brings claims against Total for unjust enrichment and breach of fiduciary duty based on allegations that Total appropriated the value of its work and confidential information leading to the largest oil, natural gas, and sulphur discovery in the world in over 40 years (in the Northeastern Caspian Sea, offshore Kazakhstan), and then refused to pay Grynberg fair compensation for the value of the confidential information, work and contacts that led to this discovery. See First Am. Comp. Pars. 3, 43-44. Grynberg alleges that as a direct result of wrongly appropriating Grynberg's effort, confidential

information and knowledge, Total has acquired an oil and natural gas interest in Kazakhstan having a fair market value of over ten (10) billion dollars. See First Am. Comp. Pars. 3, 9.

Total has filed three motions for summary judgment including a second motion for summary judgment based on applicable statutes of limitation and laches, as well as a motion for summary judgment on Grynberg's breach of fiduciary duty claim, and a motion for summary judgment as to all claims asserted by Jack J. Grynberg and Grynberg Petroleum Company. Grynberg has filed a cross-motion seeking to strike Total's defense of laches and limitations. Grynberg has also filed a Rule 72(a) Objection to Magistrate Judge Boland's Order of April 3, 2006. For the reasons stated on the record at the hearing and in this Order, Plaintiff's Objection is **OVERRULED**; Total's second motion for summary judgment based on applicable statutes of limitation and laches is **GRANTED**; and Plaintiff's cross-motion for summary judgment is **DENIED**.

II. ANALYSIS

A. Plaintiff's Fed. R. Civ. P. 72(a) Objections to and Appeal of Magistrate Judge Boland's April 3, 2006 Order

As an initial matter, I address Plaintiff's Objection to an Order entered by Magistrate Judge Boyd N. Boland on April 3, 2006 ("Order"). The Order resolves issues raised in Total's Motion for Protective Order, filed January 13, 2006 (docket # 278) ("Motion for Protective Order"), and

Plaintiffs' Amended Motion to Modify Protective Order, filed March 2, 2006 (docket # 307) ("Motion to Modify").

By way of background, I note that on October 25, 2004, Magistrate Judge Boland entered an Agreed Protective Order (the "Protective Order"), which allows free discovery of information between the parties for the preparation and trial of this case while restricting the general dissemination of the information exchanged in discovery which the parties deem to be confidential. The Protective Order applies "to all documents, materials, and information, including without limitation, documents produced, answers to interrogatories, responses to requests for admission, deposition testimony, and other information disclosed pursuant to the disclosure or discovery duties created by the Federal Rules of Civil Procedure." Protective Order at Par 1. The Protective Order allows parties to designate materials as containing "Confidential Information." The Protective Order provides:

> All Confidential Information produced or exchanged in the course of this lawsuit *shall be used solely for the purpose of preparation and trial of this case*, and shall not be used for any business, commercial, competitive, or any other purposes whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

Id. at Par 3 (emphasis added). Confidential Information may be disclosed only to a limited and carefully defined group of "Qualified Persons," all of whom play some role in this litigation. *Id.* at Par 6.

In their Motion for Protective Order, Total sought an Order restricting Grynberg's use of the information contained in approximately 245 documents and certain deposition testimony (the "Challenged Materials") outside of this lawsuit. Grynberg objected to the request claiming that the Challenged Materials do not contain trade secrets and should not be subject to the limitations on disclosure established in the Protective Order. Grynberg is involved in a related litigation against Shell Exploration, B.V., pending in front of Chief Judge Babcock, which apparently also involves the Kazakhstan oil fields and another member of the North Caspian Sea Consortium. In its Motion to Modify Grynberg seeks an order modifying the Protective Order to allow "use of certain 'confidential' documents produced in this case in the related *Shell* litigation." Pls.' Motion to Modify at Par 1.

In his Order, Magistrate Judge Boland stated, "This is not a discovery dispute. To the contrary, Total has produced all of the Challenged Materials to the Grynberg plaintiffs, and the Grynberg plaintiffs are free to use those materials in this litigation, subject to the limitations of relevancy, authenticity, and the like. The issue here is the ability of the Grynberg plaintiffs to disseminate the Challenged Materials, obtained through discovery here under the protections of the Agreed Protective Order, to the public or in other, collateral litigation." Order at 8.

Magistrate Judge Boland further stated, "I am persuaded that the documents and other materials at issue here include Total's internal memoranda, employee notes, private business correspondence, and draft contracts related to its business dealings in

Kazakhstan. They contain sensitive commercial information about a particularly complex international business relationship which involves numerous international corporations and a foreign sovereign. The potential value of the transaction is enormous, and the risk of harm to Total from possible improper disclosure of the sensitive information is equally enormous." Order at 10.

Since Grynberg filed timely Objections to the Order on April 18, 2006, I must review Magistrate Judge Boland's Order to determine whether it is "clearly erroneous or contrary to law" since the nature of the matter is nondispositive. FED. R. CIV. P. 72(a). "An order is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Cook v. Rockwell Int'l Corp.*, 147 F.R.D. 237, 242 (D. Colo. 1993).

After careful review, I find that Judge Boland's Order is not clearly erroneous or contrary to law. As Judge Boland ultimately determined, "The better approach, particularly in view of the sensitivity of the disputed materials and enormous potential for harm to Total which could result from misuse of Total's confidential materials, is to require the Grynberg plaintiffs to seek by subpoena in the Shell litigation any materials they believe may be relevant there. Total, Shell, and any other interested party would then be in a position to assert their positions with full knowledge of the context of the dispute. " Order at 12. I note that at the May 12, 2006 hearing the parties indicated that Grynberg recently sought the Challenged Materials from Total through a subpoena issued in the Shell litigation. In

addition, I note that counsel for Total affirmed during the May 12, 2006 hearing that they would not challenge the subpoena on the basis that it was not validly served. In light of the foregoing, Grynberg's Objection is **OVERRULED**.

B. Defendant's Second Motion for Summary Judgment Based on Limitations and Laches

1. Introduction

I now turn to Total's second motion for summary judgment based on limitations and laches. Total filed its first motion for summary judgment based on statute of limitations on January 16, 2004. Grynberg then filed a cross-motion for summary judgment on the issue of statutory tolling of the statute of limitations pursuant to Colo. Rev. Stat. § 13-1-125. In its first motion for summary judgment, Total argued that pleadings filed in a 1993 case brought by BP Exploration Operating Company ("BPX") against Grynberg (the "BPX Litigation"), along with an Answer and Counterclaims filed by Grynberg Production Company in June 1994, show conclusively that Grynberg was aware as early as 1993 of the relevant facts giving rise to the claims at issue, that Grynberg unreasonably delayed bringing this suit, and that Total was prejudiced by this delay.

The essence of Grynberg's claims for breach of fiduciary duty and unjust enrichment is undisputed. Grynberg alleges that in July of 1990 Grynberg provided representatives of Total "confidential geologic, seismic, and scientific data confirming enormous oil and natural gas deposits in an Area of Mutual Interest (AMI) offshore Kazakhstan under the Caspian sea." Affidavit

of Jack J. Grynberg, December 22, 2003 at Par 2; see also First. Am. Comp. It was Grynberg's intent to use his personal, professional and governmental contacts within the Kazakh government to negotiate a contract with the Republic of Kazakhstan and other Western oil companies "for production of oil, natural gas, and other minerals from the AMI." Affidavit of Jack J. Grynberg, December 22, 2003 at P 3; see also First Am. Comp. Par 5; Letter of July 17, 1990, from Grynberg to Total. Grynberg alleges that "the information supplied to Total by Grynberg, and to other parties to the organization of western oil companies initiated by Grynberg at the behest of the government of Kazakhstan, was specifically provided on condition that Grynberg retained [sic] a fair share of the entire deal." First Am. Comp. Par 9. The terms of Grynberg's alleged agreement with Total are set forth in a July 17, 1990 Letter from Grynberg to Total ("July 17 Letter"). The AMI referenced in the July 17 Letter describes an area in the Northeastern Caspian Sea including Kashagan and Kalamakas "B" discoveries, as well as Kairan, Aktote, and other prospects. First Am. Comp. Par 5.

According to Grynberg, the terms of this agreement were breached when "several huge oil companies, including Total, by their exploration efforts based upon Grynberg's confidential information, were able to determine the value and extent of some of the Kazakhstan oil deposits in the AMI" and "later went around Grynberg to Kazakhstan officials directly, cutting Grynberg out of the entire deal . . . then denied Grynberg any compensation whatsoever for his valuable contribution to their assets and profits." First Am. Comp. Par 7. The "deal" to which Grynberg refers

is the Production Sharing Agreement executing on November 18, 1997 ("PSA"), which is attached to the First Amended Complaint as Exhibit 3. First. Am. Comp. Par 9. The PSA contains a map of the contract area, and a description of the precise coordinates of the various "blocks" within the contract area which were allocated among the parties to the PSA. See PSA at pgs. 167, 214-16.

At the same time Grynberg was sharing confidential information and entering the alleged agreement with Total, it was entering a similar agreement with BPX. Grynberg's agreement with BPX was the subject of the 1993 BPX Litigation. The pleadings filed in the BPX Litigation discuss the formation of a North Caspian Sea Consortium, which included several Western energy companies including British Petroleum and a subsidiary of Total, but not Grynberg. According to pleadings in the BPX Litigation, the parties to the North Caspian Sea Consortium signed a Preliminary Consortium Agreement in 1993 that involved an exploration research study of the hydrocarbon potential of the Kazakhstan sector of the North Caspian Sea, and later executed a Consortium Agreement that created a consortium to pursue rights to hydrocarbon exploration in the North Caspian Sea area of Kazakhstan. The parties to the Consortium Agreement later entered the November 18, 1997 PSA, which, as alleged in Grynberg's First Amended Complaint, memorialized the parties actual production rights in Kazakhstan.

By Order dated January 24, 2005, I denied the earlier series of motions finding that Grynberg's claims were not tolled, and that genuine issues of material fact existed with respect to when Grynberg discovered the

facts giving rise to its claims. I found that while the BPX pleadings put Grynberg on notice that Total was involved in an exploration research study of the hydrocarbon potential of the Kazakhstan sector of the Caspian Sea, and that Total and BP later executed a Consortium Agreement that created a consortium to pursue rights to hydrocarbon exploration, these facts did "not translate to a finding that Total actually obtained production rights to take oil and natural gas from the [AMI] at issue in this lawsuit or that Total improperly used confidential information provided by [Grynberg] in obtaining such rights, as alleged in this case." See January 24, 2005 Order. I also noted that the PSA, which memorialized Total's production rights in the area of Kazakhstan at issue was not disclosed in the 1993 litigation, was not executed until November 18, 1997, and that Grynberg asserts that it did not see the PSA until January 2002. See January 24, 2005 Order.

2. Analysis

As discussed in my January 24, 2005 Order, "A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." *Winkler v. Rocky Mountain Conference of the United Methodist Church*, 923 P.2d 152, 158 (Colo. App. 1995) (citing COLO. REV. STAT. § 13-80-108(1)), *cert. denied*, 519 U.S. 1093, 117 S. Ct. 771, 136 L. Ed. 2d 716 (1997). "The time when a plaintiff discovered, or through the use of reasonable diligence should have discovered, the . . . conduct [at issue] is normally a question of fact which must be resolved by the trier of fact, in this case a jury." *Winkler*, 923 P.2d at 158-59. "However, if the undisputed facts clearly show that a plaintiff discovered, or reasonably should

have discovered, the . . . conduct as of a particular date, the issue may be decided as a matter of law." *Id.*

An action for breach of fiduciary duty must be filed within three (3) years after the cause of action accrues. *Colburn v. Kopit*, 59 P.3d 295, 296 (Colo. App. 2000) (citing COLO. REV. STAT. § 13-80-101(1)(f))), *cert. denied* (Dec. 2, 2002). Plaintiffs' unjust enrichment claim is also subject to a three-year statute of limitations. *Luttgen v. Fischer*, 107 P.3d 1152, 1157 (Colo. App. 2005) (citing COLO. REV. STAT. § 13-80-101 (1)(a)). "For purposes of the statute of limitations, a cause of action for breach of fiduciary duty . . . accrues on the date the 'claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.'" *Colburn*, 59 P.3d at 296-97 (quotation omitted). "This standard is objective." *Id.* at 297. "The focus is on a plaintiffs knowledge of facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of [the defendant]." *Id.* (quotation omitted). "The plaintiff need only know or have reason to know the facts that underlie or are essential to the cause of action, but need not know the precise legal theory upon which the action may be brought." *Id.* To the extent the unjust enrichment claim is subject to a laches defense, I note that laches, like the statute of limitations, requires full knowledge of the facts and their significance. *See Keller Cattle Co. v. Allison*, 55 P.3d 257, 260-61 (Colo. Ct. App. 2002).

Turning to Total's second motion for summary judgment, Total asserts that new evidence obtained

subsequent to the filing of its previous summary judgment motion "definitively establishes" that no later than January 19, 1999, Plaintiffs knew or should have known of the facts giving rise to their claims. Specifically, Total asserts that Grynberg knew: "(1) that Total was a party to the [Production Sharing Agreement in Respect of the North Caspian Sea ("PSA")] giving it exploration and production rights in the Kazakh sector of the North Caspian Sea, (2) that the area subject to the PSA was within the [Area of Mutual Interest ("AMI")] defined by the AMI Proposal with respect to which Grynberg had allegedly supplied Total with confidential data, and (3) that Total was operating in that area to the exclusion of Plaintiffs and without offering compensation to Plaintiffs for any information they allegedly provided to Total in 1990." See Defendant's Second Motion for Summary Judgment Based on Limitations and Laches, pg. 7.

Total relies on several pieces of new evidence in support of its second motion. First, Total notes that the Settlement Agreement between BPX and Grynberg, executed January 19, 1999 by Plaintiff Jack J. Grynberg as President of Grynberg Production Corporation, specifically refers to the 1997 PSA and defines the agreement as follows:

> "PSC" means the Production Sharing Agreement in Respect of the North Caspian Sea, dated as of November 18, 1997, To Engage in Exploration and Production in the Contract Area (as Described in Schedule VII), in Accordance with License Series SCI No. 1016 (Oil) among . . . BG Exploration and Production Limited . . . Total Exploration Production Kazakhstan, ...

This reference to the 1997 PSA in the 1999 Settlement Agreement is significant. In his December 22, 2003, Affidavit, submitted in connection with Plaintiffs' Response to Total's December 24, 2003, Motion to Dismiss Fraud, Conversion, and Breach of Contract Claims, Plaintiff Jack J. Grynberg states that "in approximately October of 2001, I first learned that a Production Sharing Agreement involving Total and Kazakhstan . . . could be purchased . . . ." Grynberg Affidavit at Par 4. Plaintiff Jack J. Grynberg further states that the PSA "had been previously held secret by the parties, including Total, and was not published until 2000," and that "upon review of the PSA in January of 2002, for the first time I became aware of Total's actual participation in the PSA with Kazakhstan." As noted above, my January 24, 2005, Order is based on the fact that the PSA was not disclosed in the 1993 litigation, as well as the statement in Plaintiff Jack J. Grynberg's Affidavit that he was not aware of Total's participation in the PSA until January of 2002. However, the reference to the 1997 PSC in BPX Settlement Agreement indicates that, at a minimum, Grynberg should have known of Total's participation in the PSA upon execution of the Settlement Agreement in January of 1999.

Grynberg admits that he executed the BPX Settlement Agreement, but asserts, as he did in response to Total's first motion for summary judgment, that he was not aware of the nature, extent and cause of its injuries after it reviewed the PSA in 2002, and that the reference to the PSA in the BPX Settlement Agreement only provides "inquiry notice" and raised "suspicions" of a production sharing agreement in the North Caspian between Total and other oil companies

and the Republic of Kazakhstan. I now disagree with Grynberg's assertions. It is undisputed that at the time the BPX Settlement Agreement was executed, Grynberg was aware that Total was a party to the PSA and that Total had exploration and production rights in the North Caspian Sea. As set forth in the First Amended Complaint, Total's participation in the 1997 PSA, to the exclusion of Grynberg, is at the crux of Grynberg's claims in this case.

At the May 12, 2006, hearing on Total's second motion for summary judgment, I asked Grynberg's counsel to articulate what specific information was gained by Grynberg when he was finally able to review the PSA in 2002 that was not available at the time the BPX Settlement Agreement was executed. Grynberg's counsel responded that until reviewing the PSA, Grynberg was not aware of the location of Total's production rights, or how Total acquired those rights. Grynberg's counsel further argued that the BPX Settlement Agreement does not identify the precise blocks which are subject to the PSA, and that when Grynberg saw the PSA, "it showed him where the blocks were."

As to Grynberg's knowledge of the location of Total's production rights, Total notes that the AMI discussed in Grynberg's July 17 Letter covers the entire Kazakh sector of the North Caspian Sea and, therefore, the area referenced in the PSA as the "North Caspian Sea," necessarily falls within the area covered in the AMI. While the AMI identified in the July 17 Letter covers a large area, it is also undisputed that by April 11, 1996, Grynberg knew that Total was a member of the North Caspian Sea consortium, and by 1999 was aware that

the North Caspian Sea Consortium was drilling a well in the Kashagan structure, which is the specific area Grynberg alleges to have identified to Total in 1990. See April 11, 1996, Letter of Plaintiff Jack J. Grynberg; August 20, 2005, deposition of Plaintiff Jack J. Grynberg Tr. 283:21 -- 284:17; First Am. Comp. PP 3, 5, 7-8, 33-37. Moreover, in a second Affidavit by Plaintiff Jack J. Grynberg dated July 7, 2003, made in connection with an action Plaintiff Jack J. Grynberg initiated against BPX alleging that BPX fraudulently induced him into executing the BPX Settlement Agreement, Plaintiff Jack J. Grynberg states "in this Affidavit, I will show that during the two-and-a-half years in which the parties negotiated the Settlement Agreements, BPX officials repeatedly stated that BPX intended to explore, develop and produce the Kashagan Field in the Offshore Caspian Sea -- a field we understood to be the largest oil and gas find in the world in the past 30 years." In addition, an affidavit executed on July 1, 2003 by Morris I. Ettinger, an employee of Grynberg Petroleum Company, which was also made in connection with the second BPX case, states that during 1997 and 1998 a number of meetings were held between Grynberg and BPX in an attempt to settle the dispute between them "with regard to rights and benefits related to exploration and production of hydrocarbons (oil and gas) in the Capsian Sea area offshore Kazakhstan," and that in each of those meetings a representative of BPX "gave us reports on the activities which were performed and the plans for future work. He provided us with a map showing the blocks in the Caspian Sea which were assigned to the various companies. "

Based on these undisputed facts, I find that by 1999

Grynberg was aware not only that there was an expansive development taking place in the area of the North Caspian Sea that Grynberg viewed as valuable, but also the location in which BPX and other parties to the North Caspian Sea consortium were operating. Moreover, upon execution of the BPX Settlement Agreement Grynberg knew or should have known that Total and the other members of the North Caspian Sea consortium had obtained actual production rights in this area. Even assuming that Grynberg did not see a copy of the PSA until January 2002, he was on notice much earlier that Total had entered into a production sharing agreement in the North Caspian Sea, to the exclusion of Grynberg, in the area that Grynberg alleges it identified to representatives of Total as containing enormous oil and natural gas deposits. I do not find credible Grynberg's assertion that his claims against Total did not accrue until saw the precise "blocks" described in the PSA. The fact that Grynberg knew or should have known by January 19, 1999, that Total had obtained actual production rights in the AMI identified in the July 17 Letter, to the exclusion of Grynberg, is enough to trigger the statute of limitations as to Grynberg's claims for breach of fiduciary duty and unjust enrichment in this case. *See Chasteen v. Unisia Jecs Corp.*, 216 F.3d 1212, 1218 (10th Cir. 2000) (a plaintiff need not "conclusively" know of the injury and its cause before a statute of limitations is triggered."). Moreover, during the May 12, 2006, hearing, Grynberg admitted that the PSA does not identify which party was operating in which block and that this information was not obtained until the parties conducted discovery. Therefore, the current record before me shows that Grynberg and his company had all the information necessary to bring their claims by January 19, 1999.

In its cross-motion for summary judgment Grynberg seeks to strike Total's defense based on laches and statute of limitations. In this cross-motion Grynberg asserts for the first time that his claims did not arise until sometime in June 2002, when the Kashagan field was declared commercial. Pls.' Cross-Motion at 4. I reject this argument. First, the argument is not consistent with Grynberg's response to Total's first or second motions for summary judgment, in which Grynberg asserts that his claims accrued when he first saw the PSA in 2002. As discussed above both the breach of fiduciary duty claim and the unjust enrichment claim are subject to a three year statute of limitations. Moreover, "a cause of action for breach of fiduciary duty . . . accrues on the date the 'claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another.'" *Colburn v. Kopit*, 59 P.3d 295, 296-7 (Colo. App. 2000) (quotation omitted). Second, there is no requirement that a plaintiff know the extent of his or her damages before a claim begins to accrue. *See Dove v. Delgado*, 808 P.2d 1270, 1273-74 (Colo. 1991). Grynberg's alleged injuries in this case stem from Total's participation in the PSA, and are not tied to the profitability of the Kashagan Field. At the May 12, 2006, hearing Grynberg's counsel argued that Total's breach of fiduciary duty occurred "almost immediately after the July 1990 meeting [between Total and Grynberg], and continued throughout, culminating in the June 9, 1993 signing of the preliminary consortium agreement. Total's rights, which were vested by the November 1997 production sharing agreement were the fruits of that initial consortium agreement. . . . [Total] would not have been in that PSA but for the

June 9, 1993 . . . preliminary consortium agreement." These statements further buttress my conclusion that, as a matter of law, Grynberg's claims in this case accrued, at the latest, upon execution of the BPX Settlement Agreement on January 19, 1999. Plaintiffs initiated this action on July 17, 2003. Therefore, Plaintiff's claims in this case for breach of fiduciary and unjust enrichment are barred by the three-year statute of limitation and Total is entitled to summary judgment in its favor as to these claims.

Based on the foregoing analysis, Grynberg's cross-motion for summary judgment seeking to strike Total's defense based on laches and statute of limitations is denied. Because I conclude that Plaintiffs' claims in this case are barred by the statute of limitations, I need not address the arguments raised in Total's motion for summary judgment on breach of fiduciary claim, or Total's motion for summary judgment against Jack J. Grynberg and Grynberg Petroleum Company.

III. CONCLUSION

In conclusion, for the reasons stated above, it is

ORDERED that Defendant's Second Motion for Summary Judgment Based on Limitations and Laches, filed September 16, 2005 (docket # 200) is **GRANTED**. The claims and causes of action asserted against Total are hereby **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Defendant's Motion for Summary Judgment on Breach of Fiduciary Duty Claim, filed September 16, 2005 (docket # 201) is **DENIED AS MOOT**. It is

FURTHER ORDERED that Defendant's Motion for Summary Judgment Against, filed September 16, 2005 (docket # 202) is **DENIED AS MOOT.** It is

FURTHER ORDERED that Plaintiffs' Cross-Motion for Summary Judgment to Strike Defendant's Defenses of Laches and Limitations with Authority, filed December 20, 2005 (docket # 266), is **DENIED.** It is

FURTHER ORDERED that Grynberg's Fed. R. Civ. P. 72(a) Objections to and Appeal of Magistrate Judge Boland's April 3, 2006, Order, filed April 18, 2006 (docket # 324), is **DENIED.**

Dated: May 31, 2006

BY THE COURT:

s/ Wiley Y. Daniel

U. S. District Judge

Filed 10/7/2008
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
August 26, 2008, Filed

No. 06-1328,

JACK J. GRYNBERG; GRYNBERG PRODUCTION CORPORATION, and its successors; GRYNBERG PETROLEUM COMPANY, and its successors,
Plaintiffs - Appellants,
v.
TOTAL S.A.,
Defendant - Appellee.

No. 06-1355

JACK J. GRYNBERG; GRYNBERG PRODUCTION CORPORATION and its successors; GRYNBERG PETROLEUM COMPANY, and its successors,
Plaintiffs - Appellants,
v.
SHELL EXPLORATION B.V. and SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. f/k/a SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.,
Defendants - Appellees.

JUDGES: Before HARTZ, McKAY, and TYMKOVICH, Circuit Judges.

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

No. 04-8384

SUPREME COURT OF THE UNITED STATES

PAUL ALLEN DYE,
Petitioner
v.
GERALD HOFBAUER, WARDEN

October 11, 2005, Decided

OPINION

Per Curiam.

[1A] Tried by a jury for the third time, petitioner Paul Allen Dye was convicted in the Recorders Court in Detroit, Michigan, on two counts of murder and one count of possession of a firearm during commission of a felony. His defense in each of his three trials was that the crimes were committed by one of the prosecution's key witnesses, who was present at the scene of the crimes.

The Michigan Court of Appeals upheld the convictions on direct review, *People* v. *Dye*, No. 136707 (Nov. 28, 1995) *(per curiam)*, App. to Pet. for Cert. 109, and further review was denied by the Supreme Court of Michigan, *People v. Dye*, 453 Mich. 852, 551 N. W. 2d 189 (1996). Petitioner sought relief in habeas corpus in the United States District Court for the Eastern District of Michigan, alleging various federal constitutional claims. Denied relief, petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

Over the next five years, the Court of Appeals issued various orders and two opinions in the case. 45 Fed. Appx. 428 (CA6 2002) *(Dye I);* 111 Fed. Appx. 363 (CA6 2004) *(Dye II).* In *Dye I,* a majority of a divided three-judge panel ruled the state prosecutor had engaged in flagrant misconduct during the jury trial. On this ground it reversed the District Court's order denying habeas relief. The panel did not address petitioner's other claims. 45 Fed. Appx., at 428, n. 1.

Respondent moved for panel or en banc rehearing. In the time between this motion and its disposition one of the judges in the majority retired, and the record was returned to the District Court.

In *Dye II,* a reconstituted panel granted the petition for rehearing and ruled in favor of respondent. In an opinion authored by the original panel's dissenting judge, the Court of Appeals held that, although Dye had raised a prosecutorial misconduct claim in state court, the record did not show that he presented it there as a violation of a federal right. "Because the brief filed by the petitioner in his direct appeal to the Michigan Court of Appeals is not in the record, we have no way of determining exactly how he framed the issue in state court." 111 Fed. Appx., at 364. As further support for its conclusion, the panel noted the Michigan Court of Appeals' decision analyzed the relevant claim only in terms of state law. The panel concluded, moreover, it would decline to address the claim even if Dye had properly raised it in state court because the federal habeas corpus petition's allegations were too vague and general to be considered fairly presented. *Ibid.* Stating that its previous opinion, *Dye I,* had disposed of any remaining claims, the *Dye II* panel

vacated the prior judgment and affirmed the District Court's denial of the habeas corpus petition.

Dye seeks review here. There are two errors in *Dye II* meriting reversal of the judgment.

[1B] [2] First, the Court of Appeals was incorrect in *Dye II* to conclude that, when seeking review in the state appellate court, petitioner failed to raise the federal claim based on prosecutorial misconduct. The Court of Appeals examined the opinion of the state appellate court and noted that it made no mention of a federal claim. That, however, is not dispositive. Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it. "It is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court . . . ." *Smith v. Digmon*, 434 U.S. 332, 333, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978) *(per curiam)*.

[1C] Contrary to the holding of the Court of Appeals, the District Court record contains the brief petitioner filed in state court, and the brief sets out the federal claim. The fourth argument heading in his brief before the Michigan Court of Appeals states: "THE PROSECUTOR DENIED DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL BY NUMEROUS INSTANCES OF MISCONDUCT." App. to Pet. for Cert. 80 (capitalization in original). Outlining specific allegations of prosecutorial misconduct, the text of the brief under this argument heading cites the Fifth and Fourteenth Amendments to

the Constitution of the United States. It further cites the following federal cases, all of which concern alleged violations of federal due process rights in the context of prosecutorial misconduct: *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *United States v. Valentine*, 820 F.2d 565 (CA2 1987); *United States v. Burse*, 531 F.2d 1151 (CA2 1976).

This is not an instance where the habeas petitioner failed to "apprise the state court of his claim that the . . . ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan v. Henry*, 513 U.S. 364, 366, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) *(per curiam)*. Nor is this a case where a state court needed to look beyond "a petition or a brief (or a similar document)" to be aware of the federal claim. *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). The state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right. It was error for the Court of Appeals to conclude otherwise.

A second reason the *Dye II* panel denied relief was that the habeas petition filed in the United States District Court presented the prosecutorial misconduct claim in too vague and general a form. This alternative holding cannot rescue the *Dye II* judgment, for it, too, is incorrect. The habeas corpus petition made clear and repeated references to an appended supporting brief, which presented Dye's federal claim with more than sufficient particularity. See Fed. Rules Civ. Proc. 81(a)(2), 10(c). As the prosecutorial misconduct claim

was presented properly, it, and any other federal claims properly presented, should be addressed by the Court of Appeals on remand.

The motion to proceed *in forma pauperis* and the petition for certiorari are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Case No. 07SC134

SUPREME COURT OF COLORADO

Petitioner: CASSANDRA LEWIS,

v.

Respondents: FRANK LEWIS AND LUCY LEWIS.

June 30, 2008, Decided

COUNSEL: Dietze and Davis, P.C., Joel C. Maguire, Boulder, Colorado, Attorneys for Petitioner.

Michael P. Dugan, Greeley, Colorado, Attorney for Respondents.

JUDGES: JUSTICE MARTINEZ delivered the Opinion of the Court. JUSTICE EID dissents, and JUSTICE RICE and JUSTICE COATS join in the dissent.

OPINION BY: MARTINEZ

OPINION

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In this appeal, we review the unpublished opinion of the court of appeals in *Lewis v. Lewis*, 2006 Colo. App. LEXIS 2014, WL 3441766 (Colo. App. 2006), which reversed the trial court's judgment. The trial court found that the defendants were unjustly enriched when they failed to compensate the plaintiff for her

contribution to a home that was sold for a significant profit. The court of appeals held that unjust enrichment claims present questions of mixed law and fact. Thus, it reviewed the trial court's determination that the plaintiff satisfied the elements of unjust enrichment de novo and reached a contrary result.

We consider whether the court of appeals applied the wrong standard in its appellate review of the trial court's conclusion. We hold that the proper appellate review standard for claims of unjust enrichment is abuse of discretion. However, we also recognize that the trial court must apply the correct test for deciding whether enrichment is unjust.

We hold that claims of unjust enrichment by close family members or confidants should be evaluated by considering the mutual purpose of the parties. To determine unjust enrichment in situations involving a failed gift or failed contract between close family members and confidants, trial courts must determine whether there existed a mutual purpose between the parties. If such a purpose did exist and one party profited from a significant deviation from this mutual purpose, that party is unjustly enriched.

Applying this standard to the present case, we find support in the record for the trial court's determination that the plaintiff's in-laws purchased the home so that their son and daughter-in-law could have the benefits of home ownership. As a consequence, we find that the trial court did not abuse its discretion when it determined that the defendants in the case were unjustly enriched.

I. Facts and Procedural History

Cassandra Lewis ("Cassandra") asserts that her ex-in-laws were unjustly enriched through the sale of the house where Cassandra and her husband Sammy lived from June 1986 to September 2000. On September 6, 1984, Cassandra and Sammy Lewis were married. Over the next two years, the couple lived with Sammy's parents, Frank and Lucy Lewis ("The Lewises"). After the birth of their daughter in February 1986, Cassandra and Sammy began looking for a place of their own to either rent or purchase. One house they considered was at 403 Division Avenue in Platteville, but on the advice of Frank Lewis, they decided against purchasing it because it needed too much work. Although Frank Lewis discouraged Cassandra and Sammy from buying the property, he and Lucy Lewis surreptitiously purchased the home on May 20, 1986. When Cassandra and Sammy found out that the Lewises bought the house, the Lewises told them that they meant the purchase to be a surprise gift for Cassandra and Sammy.

Frank Lewis purchased the house for a sale price of $ 29,500. He made a $ 5,000 down payment and executed a mortgage to the seller for the balance. The mortgage was calculated over twenty years with monthly payments of principal plus interest of $ 236.43. Cassandra and Sammy made the monthly mortgage payments, paying $ 236.46 directly to the Lewises. The Lewises then paid that same amount to the mortgage holder. At trial, Cassandra testified that the Lewises told her "that they put down $ 5,000 as a gift on the house as a surprise for us." The trial court made a factual finding that the Lewises proposed this

arrangement to "ensure that the payments were made because [the Lewises] were concerned that Sammy had a drinking problem and that payments might not otherwise be made on time." The court further found that Cassandra and Sammy faithfully made all the payments for the fourteen years they occupied the house prior to their separation.

In addition to paying the Lewises the mortgage amount due each month, Cassandra and Sammy were named the insureds on the homeowner's insurance policy. The trial court found that Cassandra and Sammy paid the full cost of insuring the house. The trial court also found that when the property suffered a loss, such as hail damage, the insurance benefits were paid directly to Cassandra and Sammy. Cassandra and Sammy paid the real estate taxes, utilities, and all maintenance costs. Each of these bills were mailed directly to Cassandra and Sammy. Likewise, Cassandra and Sammy paid each bill directly to the party owed.

Further, Cassandra and Sammy presented themselves as owners of the property. The trial court made a finding of fact that when hearings were held to determine whether Platteville would put in a new sewer line, Cassandra and Sammy attended the hearings and spoke as the property's owners. They also undertook various improvements to the property. Over the fourteen years in which Cassandra and Sammy lived in the house, they added carpet, vinyl flooring for the kitchen and bathroom, tiled the laundry room, painted the interior and exterior of the house "a couple of times," removed old wallpaper and put up new wallpaper, replaced light fixtures, vanities, and mirrors, and added ceiling fans in three rooms.

As for the exterior of the house, the trial court found that Cassandra and Sammy first put in a rock driveway and later replaced it with concrete. They put up a chain link fence, installed a satellite dish, and built an above-ground swimming pool. In addition, Cassandra and Sammy cleared space for and installed a basketball court on the property. They also laid new sod.

The trial court made a specific factual finding that at no point did Cassandra and Sammy seek the approval of the Lewises when they undertook these improvements. No evidence was presented and the trial court did not find that the Lewises contributed financially to any of these improvements, aside from some early cleanup work before the house was habitable.

After the birth of their second child in 1992, Cassandra and Sammy began looking for a larger home. The trial court found that during this time, the Lewises told Cassandra and Sammy "that they should not sell the property but should instead rent it out and use the rental income to pay for the new home." Cassandra and Sammy decided to build an addition to the house. The record indicates and the trial court found that the Lewises did not hire the contractor, nor sign the construction contract; rather, Cassandra and Sammy did.

Throughout the fourteen years, the parties made several comments concerning property ownership. Besides putting the title in their name because of Sammy's drinking problem, the trial court found that the Lewises assured Cassandra "that the house was hers and she could live there as long as she wanted." Some years later, Frank Lewis was asked by his six-

year-old granddaughter, "Grandpa, when is this going to be our house?" Frank Lewis claimed to have responded that it was her house, as long as her parents paid the rent. Frank Lewis testified that he told Cassandra the same thing. Cassandra disputed this claim.

The trial court made a factual finding that at one point during the fourteen years in which Cassandra and Sammy occupied the residence, "Frank Lewis went to the County to try to change the title out of his and Lucy Lewis' names and into [Cassandra] and Sammy's." However, when he was told by county officials that he must first refinance the property to put it in Cassandra and Sammy's names, he did not follow through on the title change. Frank Lewis testified that he decided to sell the house to Cassandra and Sammy, presumably for the remaining balance plus the $ 5,000 down payment, but that sale never occurred.

Frank Lewis further testified that he told Sammy he could purchase the house if he paid back the $ 5,000 down payment and refinanced the loan to assume the remaining balance owed. Both Lucy and Frank Lewis conceded that while Sammy was aware of this option, Cassandra was never told that the house could be purchased by repaying the down payment.

After sixteen years of marriage and fourteen years living at the Platteville residence, Cassandra, along with her two daughters moved out in September 2000. Less than two months later, on November 22, 2000, the Lewises sold the house to an unrelated buyer for $ 122,000. The net proceeds from the sale of the house were $ 108,879.86. Cassandra and Sammy's marriage

dissolution was finalized on April 20, 2002. The dissolution did not include reference to the house, and Cassandra received no compensation from the sale.

Cassandra filed suit against the Lewises claiming ownership of the Platteville home. At trial, Cassandra argued that the Lewises gave Cassandra and Sammy the house as a gift and that the court should enforce the gift and give Cassandra and Sammy the house. In the alternative, Cassandra asserted that the court should enforce the parties' mutual desire that the property be sold to Cassandra and Sammy upon payment of the remaining balance of the note and reimbursement for the down payment. However, because Cassandra was unaware of the option to purchase the house before it was sold to the unrelated party, she asserted that the only way to enforce the mutual purpose of the parties and to prevent the unjust enrichment of the Lewises was to place her in the shoes of the seller at the time of the house was sold. Under this theory, she would be entitled to the Lewises net proceeds of $ 108,879.86 minus the $ 5,000 down payment.

The Lewises' main argument against Cassandra's ownership claim was that they were renting the property to Cassandra and Sammy for the fourteen years in question. During that time, however, the Lewises neither raised the rent from the original $ 236.43 nor reported the monthly payments as income. Further, the Lewises did not pay for the refurbishment and updating that is customary when owning rental property. In addition, the Lewises did not claim rental property deductions on their tax returns for any of the fourteen years.

Following the presentation of evidence, the trial court made its ruling from the bench. There was no written order outlining the basis for its findings. The court's two sentence ruling was:

ORDERED that judgment enter in favor of Plaintiff and against Defendants in the amount of $ 17,345.37. Plaintiff is also awarded costs.On the minute order, the court noted that this amount was the difference between the original sale price of the house, $ 29,500, and the amount owed on the mortgage at the time of the sale, $ 12,154.63. Cassandra's costs came to $ 1,411.20.

Cassandra appealed, and the Lewises cross-appealed. Cassandra claimed that the trial court erred when it failed to find in her favor for the entire sale price, minus the existing mortgage and down payment. The Lewises countered that the trial court's partial finding for Cassandra was unsupported by the facts and unreasonable under the applicable law. Upon review, the court of appeals vacated the trial court's judgment on grounds that the trial court's two-sentence order did not contain findings of fact and conclusions of law sufficient to give an appellate court a basis by which to undertake a review.

On remand, the trial court made extensive factual findings from the trial record and supporting documents. It explained that its first ruling, awarding Cassandra $ 17,345.37, was wrong. It then entered a new, different ruling in Cassandra's favor, and explained the legal basis for the new decision.

Among the court's factual findings were the following.

The court ruled that Cassandra failed to prove that the house was a gift to her and Sammy from the Lewises. However, the trial court concluded that there was an oral agreement between the parties that allowed Cassandra and Sammy to acquire legal title to the property if they refinanced the loan balance and reimbursed the Lewises for the $ 5,000 down payment. The trial court further found that in making its first ruling it believed that "although only [Sammy] had actual knowledge of the agreement, [Cassandra] had 'constructive knowledge' of it by her being married to [the Lewises'] son."

In support of its finding that Cassandra and Sammy had the option to purchase the house, the trial court found that the Lewises "had an identical agreement with another son" regarding a different piece of property, adjacent to 403 Division Avenue in Platteville. The court noted that evidence presented at trial "revealed that the other son purchased that property by paying the down payment and paying off the indebtedness," at which point the Lewises conveyed the property to him. The trial court concluded that the Lewises offered the same agreement to Cassandra and Sammy.

After stating its factual findings, the trial court changed its ruling. It stated, "The court concludes that it was in error in its award of damages." The court then awarded Cassandra $ 103,879.86. This amount was the sale price, $ 122,000, minus the remaining balance on the note, $ 12,154.63, and the $ 5,000 down payment.

To arrive at this holding, the trial court made several further findings and conclusions. First, the court

concluded that the Colorado Statute of Frauds, requiring that the agreement to transfer land be in writing, did not apply in the present case. The trial court found that in light of the close familial connection between the parties, there existed a "confidential relationship," which caused each party to "relax their guard that would have otherwise caused them to require that the arrangement be in writing." Second, the trial court found that because of the confidential relationship, the parties' agreement "was not at arm's length." Thus, the Lewises had a duty to deal fairly with Cassandra and Sammy regarding the house. The trial court found that the Lewises violated this duty when they sold the property without informing Cassandra so that they could take advantage of their purchase option.

As a consequence of the Lewises' quick sale of the property, the trial court found that Cassandra was prevented from acquiring the value in the property. Instead, the court concluded that they merely "paid rent and performed maintenance and improvements at their own expense." Conversely, the Lewises "profited from [Cassandra and Sammy]'s efforts in the form of the increased value they received when [they] sold the property." Consequently, the Lewises unfairly benefited from the sale, causing the trial court to conclude that "if it weren't for the special trust relied upon by [Cassandra and Sammy] because of the familial relationship, the agreement would have been reduced to writing or [Cassandra and Sammy] would have chosen to purchase another property instead of continuing to 'rent' from [the Lewises]."

The trial court cited two legal bases for its decision that

Cassandra was due the profits from the sale of the house. First, the trial court concluded that Cassandra should recover on a theory of resulting trust. Second, the court determined that Cassandra should recover on a theory of unjust enrichment.

The Lewises appealed Cassandra's award of $ 103,879.86. The court of appeals held that Cassandra could not recover under resulting trust because there was no express trust, nor did the Lewises intend that a third-party vendor convey the property. Furthermore, the court of appeals found that the Lewises were not unjustly enriched when they sold the property. The court of appeals stated that "a theory of unjust enrichment is a mixed question of law and fact." Thus, the panel reviewed the trial court's conclusions de novo, finding that Cassandra and Sammy's failure to take advantage of their purchase option before the Lewises sold the property made them mere tenants, without standing to claim an ownership right or an equity loss. As a consequence, the court of appeals concluded that the enrichment of the Lewises by the contribution of Cassandra and Sammy to the property was not unjust. Cassandra Lewis brought this appeal claiming that the court of appeals applied the incorrect standard of review and reached the wrong result when it overturned the trial court's ruling.[1]

We agree with Cassandra. We hold that the court of appeals erred when it held unjust enrichment presents a mixed question of law and fact. The proper appellate review standard for unjust enrichment determinations is abuse of discretion. Thus, we apply the abuse of discretion standard to determine whether the trial

court erred in finding that the Lewises were unjustly enriched in the present case.

To analyze whether the trial court abused its discretion, we reexamine the third prong of unjust enrichment and apply it to the specific circumstance presented here.[2] In so doing, we find that claims of unjust enrichment by close family members or confidants require that the trial court employ a particularized legal standard to evaluate the parties' commonality of purpose. When an enriched party deviates significantly from this mutual purpose, resulting in his enrichment at the expense of the close family member or confidant, he has been unjustly enriched.[3]

II. Standard of Review

In reversing the trial court's ruling that the Lewises were unjustly enriched, the court of appeals expressly stated that review of an award for unjust enrichment is a mixed question of law and fact. The court of appeals then reviewed the trial court's findings of fact under an abuse of discretion standard, but reviewed the trial court's "conclusions of law" de novo. In so doing, the court of appeals departed from our case law, which states that "[g]enerally, the power to fashion equitable remedies lies within the discretion of the trial court." *La Plata v. United Bank*, 857 P.2d 410, 420 (Colo. 1993) (citing Restatement (Second) of Contracts § 357 (1981)).

Unjust enrichment claims require that courts make extensive factual findings to determine whether a party has been unjustly enriched. *Martinez v. Colo. Dep't of Human Servs.*, 97 P.3d 152, 159 (Colo. App. 2003). Because careful consideration of particular

circumstances is required in unjust enrichment claims, we have reviewed trial court determinations for abuse of discretion. *La Plata*, 857 P.2d at 420.

Nonetheless, we note that the standard of review for a trial court's holding of unjust enrichment has not been consistently applied. For instance, the court of appeals cites *Ciccarelli v. Guaranty Bank* for the proposition that unjust enrichment presents a mixed question of law and fact. 99 P.3d 85, 89 (Colo. App. 2004). *Ciccarelli* cites another court of appeals' case, *Scott Co. v. MK-Ferguson*, 832 P.2d 1000, 1003 (Colo. App. 1991), which in turn cites a Washington state case, *Hensel Phelps Construction Co. v. King County*, 57 Wn. App. 170, 787 P.2d 58 (Wash. 1990) for this proposition. We find this jurisprudence to be in conflict with this court's ruling in *La Plata*.

In *La Plata*, a lender sued a partnership of doctors over financing of a new medical office building. 857 P.2d at 412. The trial court based an award to the bank on its determination that the bank's estimate of the property's depreciation was more accurate than the estimate put forth by the doctors. *Id.* at 413-14. The doctors appealed, claiming that the trial court did not have discretion to choose one estimate over the other. *Id.* On appeal, we held that trial courts have broad discretion to determine equitable claims of unjust enrichment. *Id.* at 420 (citing *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 166-67 (Colo. 1993)); *see also Smith v. Smith*, 172 Colo. 516, 518, 474 P.2d 619, 621 (1970) (holding that when the Colorado Supreme Court is called on to review a matter within the sound discretion of a trial judge, appellate courts will only reverse for clear abuse of that discretion).

Further, in *La Plata* we expressly concluded that "[s]uch rulings will not be disturbed on appeal absent a showing of abuse of discretion." 857 P.2d at 420; *see also Colo. Nat'l Bank*, 846 P.2d at 167. While the discretion at issue in *La Plata* pertained to the trial court's determination of the appropriate remedy, we did not make that distinction before stating that the standard of review was abuse of discretion. Further, we have viewed this discretion as broader than merely devising a remedy. *See Colo. Nat'l Bank*, 846 P.2d at 166-67. When considering equity claims, a trial court's discretion extends to both the factual basis and application of the correct test. Restatement (Second) of Contracts § 357 cmt. c (1981). Thus, while the court of appeals is correct that the trial court's findings of fact are reviewed for abuse of discretion, we do not agree that the trial court's conclusion whether the party was unjustly enriched is simply made de novo by the reviewing court. Instead, the conclusion of the trial court that a party was unjustly enriched is reviewed for abuse of discretion. Because this holding conflicts with the court of appeals' determination in *Ciccarelli* that unjust enrichment creates mixed questions of law and fact, we now overrule that portion of the *Ciccarelli* opinion. *See* 99 P.3d at 88.

We note, however, that the trial court's discretion in equity determinations is not unlimited. Rather, the trial court must apply the appropriate test to determine the existence of unjust enrichment. *Humphrey v. O'Connor*, 940 P.2d 1015, 1022 (Colo. App. 1996). Thus, while equity rulings generally lie within the discretion of the trial court, appellate courts review de novo whether the trial court correctly understood the appropriate test for unjust enrichment. We next discuss

unjust enrichment generally, and as it pertains to special factual circumstances.

III. Unjust Enrichment Between Close Family Members or Confidants

A person is unjustly enriched when he benefits as a result of an unfair detriment to another. *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000). The proper remedy upon a finding of unjust enrichment is to restore the harmed party "to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its monetary equivalent." Restatement of Restitution § 1 cmt. a (1937).

The claim of unjust enrichment is a judicially-created remedy designed to undo the benefit to one party that comes at the unfair detriment of another. *Salzman*, 996 P.2d at 1265. Unjust enrichment is based on principles commonly associated with restitution. *DCB Constr. Co. v. Central City Dev. Co.*, 965 P.2d 115, 119 (Colo. 1998). "When restitution is the primary basis of a claim, as opposed to a remedy for bargains gone awry, it invokes what has been called a 'contract implied in law.'" *Id.* (citing Joseph M. Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208, 1212-13 (1973)). As such, it is an equitable remedy and does not depend on any contract, oral or written. *See Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass'n*, 649 P.2d 1093, 1097 (Colo. 1982).

We have previously determined that a party claiming unjust enrichment must prove that (1) the defendant received a benefit (2) at the plaintiff's expense (3) under

circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation. *Salzman*, 996 P.2d at 1266-67; *See also DCB*, 965 P.2d at 119-20. We do not question the determination that the Lewises were conferred a benefit at Cassandra's expense. Instead, we turn our attention to the third prong consideration of whether the enrichment was unjust, which creates difficult questions for trial courts. *See Page v. Clark*, 197 Colo. 306, 314, 592 P.2d 792, 797 (1979). We have not previously addressed this third prong in circumstances similar to the case before us now.[4] However, in a different factual scenario, we found reason to particularize the third prong.

In *DCB*, we enunciated a particularized analysis for the third prong of unjust enrichment when a landlord is sued for unjust enrichment brought about by a tenant. 965 P.2d at 123. There, a contractor, working at the direction of the tenant, made numerous improvements to a historic building. *Id.* at 117-18. When the tenant defaulted on both the construction contract and the lease agreement, the contractor sued the landlord, claiming that the landlord was unjustly enriched by the improvements made to the rental property. We held that, in claims against a landlord, where there is no direct relationship between the landlord and the contractor creating a contract or quasi-contract and the landlord did not act fraudulently, the landlord is not unjustly enriched when he receives a benefit from the failed contract between a tenant and a party working at the tenant's behest. *Id.* at 117. However, we were quick to note that the requirement of malfeasance is specific to a contractor's claim that the landlord was unjustly enriched and did not extend to all unjust enrichment

circumstances. *See id.* at 123. We crafted this exception "[b]ecause tenants frequently contract for improvements to leased property, [and therefore] the law must be sufficiently predictable so that the appropriate parties can adequately calculate and make adjustments for the risks they face." *Id.* at 121. As a consequence of DCB, trial courts must apply a particularized analysis requiring landlord malfeasance in order to meet the third prong for unjust enrichment. We now consider whether this particularized third prong for unjust enrichment is necessary for claims arising from a close family member or confidant factual scenarios.

The case before us presents the difficult but not altogether uncommon circumstance of a failed gift or failed contract between close family members or confidants, resulting in a claim of unjust enrichment. *See, e.g., Salzman*, 996 P.2d at 1265; *Combs v. Tibbitts*, 148 P.3d 430, 432 (Colo. App. 2006); *Wilson v. Prentiss*, 140 P.3d 288, 289-90 (Colo. App. 2006); *Martinez*, 97 P.3d at 157; *In re Marriage of Smith*, 7 P.3d 1012, 1016 (Colo. App. 1999). By considering the factual basis, the court may better understand the parties' intentions when they entered into the agreement. *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 146 (Colo. 2006). However, claims of unjust enrichment arising from the implicit assumptions inherent in an arrangement between close family members or confidants bear little similarity to the circumstance for which we required malfeasance. In *DCB*, the parties to the dispute did not have a direct relationship. The claim arose from a benefit conferred by the contractor to the tenant, from which the landlord ultimately benefited. *DCB*, 965 P.2d at 119. In the circumstance of a failed gift or contract

between close family members or confidants, the claim arises from the close relationship, the mutual purpose, and the often ill-defined agreement of the parties. Thus, we do not apply the requirement of malfeasance from *DCB* to the third prong of the test for unjust enrichment to these types of factual circumstances. Instead, claims involving close family members or confidants are a consequence of a significant deviation from the mutual purpose. Thus, we find the need for a particularized third prong analysis for such circumstances.

Claims arising between close family members or confidants, where one party reasonably relies on the assertions of another in absence of a written document stems from a confidential relationship between the parties. *See Todd Holding Co. v. Super Valu Stores, Inc.*, 874 P.2d 402, 404 (Colo. App. 1993). Such a relationship exists when one party justifiably reposes confidence in another such that the parties drop their guard and assume that each side is acting fairly. *Id.; see also Page*, 197 Colo. at 310, 592 P.2d at 796. A confidential relationship between dealing parties may "impel or induce one party to relax the care and vigilance one would and should ordinarily exercise in dealing with a stranger." *Todd*, 874 P.2d at 404; *see also Dolton v. Capitol Fed. Sav.*, 642 P.2d 21 (Colo. App. 1981). Further, a confidential relationship may serve as indication of fiduciary status. *See McFarlan v. Dist. Court*, 718 P.2d 247 (Colo. 1986) (holding that a confidential relationship may exist between an attorney and client); *In re Estate of Lopata*, 641 P.2d 952 (Colo. 1982) (holding that a confidential relationship may exist between a husband and wife); *Davis v. Bd. of Psychologist Exam'rs*, 791 P.2d 1198 (Colo. App. 1989)

(holding that a confidential relationship may exist between a doctor and patient); *Weeks v. Esch*, 568 P.2d 494, 495, 39 Colo. App. 428 (Colo. App. 1977) (holding that a confidential relationship may exist between family members giving rise to constructive trusts).

Further, in various familial legal circumstances, we have found that the parties' mutuality of purpose in agreeing to the gift or making the agreement is informative in determining whether one party has been unjustly enriched. *See Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007) (holding that in construing gifts to a trust, the trial court must look to the intent of the settlors); *In re Balanson*, 25 P.3d 28, 37 (Colo. 2001) (holding that gifts made by one spouse to another during the marriage are to be considered marital property based on the trial court's determination of the intent of the parties); *Matter of Estate of Jenkins*, 904 P.2d 1316 (Colo. 1995) (holding that when considering whether a bequest extends to adopted children, the trial court should look to the testator's intent).

Borrowing from this diverse jurisprudence, we find that the unifying element is the commonality of purpose of the parties. In addition, in other factual circumstances we have looked to the intentions, expectations, and behavior of the parties to determine whether recovery in unjust enrichment is appropriate. *Cablevision*, 649 P.2d at 1098. Consequently, we hold that the parties' actions expressing mutual purpose should govern the third prong of unjust enrichment when trial courts consider situations involving failed gifts or failed contracts between close family members or confidants. In such cases, malfeasance is not

necessary to make a claim of unjust enrichment.[5] Instead, we conclude that when close family members or confidants act with a mutual purpose, unjust enrichment occurs when one party benefits from an action that is a significant deviation from that mutual purpose.

Courts considering the third prong of an unjust enrichment claim arising from a confidential relationship should look to the factual support establishing the mutuality of purpose of both the giving and receiving parties. This includes a determination by the trial court of whether both parties' actions indicate that each party possessed the same or similar purpose. In particular, the trial court should consider whether either party acted in furtherance of or detrimentally relied on the gift or agreement. Finally, the court should consider the length of time that the parties acted in furtherance of this misunderstanding. In the event that the parties intended the same outcome or the parties' mutual purpose is easily discernable, the trial court should seek by its equity determination to fulfill this failed mutual purpose when one party benefits from acting in significant deviation with this mutual purpose.

IV. Unjust Enrichment in the Present Case

Here, the trial court determined that a confidential relationship existed between Cassandra and the Lewises. The trial court stated that "[Cassandra] and her husband reasonably relied upon the confidential relationship between the parties in not requiring that the agreement be in writing." Further, in its order on remand, the trial court stated that "if it weren't for the

special trust relied upon by [Cassandra] and Sammy because of the familial relationship, the agreement would have been reduced to writing or [Cassandra] and Sammy would have chosen to purchase another property instead of continuing to 'rent' from the [Lewises]." We find no basis in the record to dispute this finding. The record supports the conclusion that Cassandra and Sammy reasonably relied on the close relationship they had with the Lewises. Thus, we find persuasive the trial court's determination that the parties' relationship was confidential, which required that the parties deal fairly with one another.

Because there is no question that the Lewises were enriched by the contributions of Cassandra and Sammy, we turn to the third prong of the analysis, namely whether the Lewises were unjustly enriched when they sold the Platteville property, despite the existence of confidential relationship indicating that the parties' mutual intent was that Cassandra and Sammy have the benefits of home ownership. We find that while the trial court did not express the particularized third prong analysis as we do today, it understood that to reach a finding of unjust enrichment, there must be a deviation from a mutual purpose, and it correctly applied that analysis in ruling for Cassandra.

Specifically, we find that the trial court correctly determined that, in light of the confidential relationship, both parties intended that Cassandra and Sammy obtain full and complete possession of the property. The trial court made factual findings demonstrating that by initially purchasing the Platteville home and encouraging Cassandra and Sammy to live there like owners, the Lewises intended

that Cassandra and Sammy enjoy the benefits of home ownership. Further, we find support in the record for the trial court's determination that Cassandra and Sammy acted as though they owned or would own the property, while the Lewises did nothing to counter this perception. For instance, the trial court found that each month Cassandra and Sammy provided a check to the Lewises in the amount of the mortgage. Moreover, the record supports the trial court's conclusion that when routine maintenance was necessary, Cassandra and Sammy performed it themselves or paid others to complete the work. Additionally, the trial court determined that when the house proved too small for their growing family, Cassandra and Sammy constructed an addition to the house. The trial court also found it noteworthy, as do we, that Cassandra and Sammy paid the property taxes on the property, and that the Lewises did not declare the rental property on their income taxes.

These factual findings support the trial court's determination that the parties' mutual purpose in acquiring the home was that Cassandra and Sammy enjoy the benefits of home ownership. The trial court's findings also indicate that Cassandra and Sammy's actions in maintaining and improving the property at their own expense demonstrated this mutual intent. Furthermore, the Lewises presented no evidence and the trial court found no support in the record for the Lewises' claim that Cassandra and Sammy were merely renters. In fact, the trial court found, with adequate support in the record, that the Lewises failed to make any substantive attempt to clarify their ownership claim over the fourteen years in which the parties relied on these assumptions.

In sum, we find support for the trial court's conclusion that the Lewises intended to give Cassandra and Sammy the benefits of home ownership, not reap those benefits for themselves. Consequently, when they sold the house without providing Cassandra the opportunity to assume ownership, the Lewises were unjustly enriched as a result of acting in significant deviation from the parties' mutual purpose. Thus, the trial court applied the correct legal analysis and acted within its discretion in finding that the Lewises were unjustly enriched when the Lewises deviated significantly from the mutual purpose indicated by the parties' actions over the previous fourteen years.

V. Conclusion

We hold that the trial court acted within its discretion when it determined that the Lewises were unjustly enriched by the sale of the Platteville house. We therefore overturn the decision of the court of appeals and order that the court of appeals reinstate the trial court's ruling in Cassandra's favor for $ 103,879.86.

1We granted certiorari on the question of "[w]hether the court of appeals applied the appropriate standard of review and reached the correct result on petitioner's unjust enrichment claim when it held unjust enrichment to be a 'mixed question of law and fact' and not a remedy 'at the discretion of the trial court.'"

2Because there is no question that the Lewises were conferred a benefit at Cassandra's expense, we do not further consider the first two prongs of the unjust enrichment analysis.

3Sammy is not a party to this action. Thus, we do not consider whether he has any viable claims.

4In *Salzman v. Bachrach*, we held that recovery for unjust enrichment was not barred by outdated public policy concerns related to the cohabitation of unmarried adults. 996 P.2d at 1269-1270. Although we then remanded the case for additional factual determinations, we had no reason to confront the issue before us today and did not consider how the third prong determination that enrichment is unjust is analyzed in particular factual circumstances. *Id.*

5We note that the court of appeals has correctly held that our DCB holding requiring malfeasance applies only in situations where a landlord receives a benefit from a failed contract between a tenant and a party working at the tenant's behest. *Ameriquest Mortgage Comp. v. Land Title Ins. Corp.*, No. 06CA0847, 2007 Colo. App. LEXIS 1400, 2007 WL 2128203 (Colo. App. July 26, 2007).

DISSENT

JUSTICE EID, dissenting.

The majority's opinion permits Cassandra to recover the full value of the home owned by the Lewises under a claim of unjust enrichment. In order to reach this result, the majority devises a theory of recovery that enforces the "mutual purpose of the parties." Maj. op. at 2. The major flaw with the majority's theory is that it bears no resemblance to the unjust enrichment cause of action. I could not find a single reported case in this jurisdiction (or any other, for that matter) that

recognized a "mutual purpose of the parties" theory of unjust enrichment. That is because unjust enrichment is not focused on the intent of the parties, as the majority seems to believe, but rather on the benefit conferred, if any, by the plaintiff that is unjustly retained by the defendant. The consequence of the majority's interpretation is that it awards full benefit of the bargain damages -- that is, the value of the home -- to Cassandra, even though no bargain ever existed. Because I believe the majority's opinion reflects a fundamental misunderstanding of the law of unjust enrichment, I respectfully dissent.

In order to prevail on a claim for unjust enrichment, the plaintiff must show that she conferred a benefit on the defendant "under circumstances that would make it unjust for defendant *to retain the benefit without paying.*" *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 119-20 (Colo. 1998) (emphasis added). Thus, the centerpiece of an unjust enrichment claim is the benefit that has been unjustly retained. *Colo. Dep't of Transp. v. Brown Group Retail, Inc.*, 182 P.3d 687, 691 (Colo. 2008) (noting that "[w]hether a party has been unjustly (or unjustifiably) enriched . . . becomes an issue only if it has been enriched by receiving a benefit at the expense of another"). Here, the majority makes virtually no attempt to determine whether Cassandra has conferred a benefit on the Lewises, and if so, what that benefit might be; nor does it attempt to quantify that benefit in order to determine what the Lewises may have unjustly "retain[ed] . . . without paying." In other words, it makes no attempt to apply the elements of unjust enrichment as they have been traditionally understood in this and other jurisdictions.

Instead, the majority forges a new cause of action for "a failed gift or failed contract between close family members or confidants." Maj. op. at 20. According to the majority, this new cause of action, as applied to Cassandra, is based on the facts that (1) the parties had an agreement (i.e., a "mutual purpose") to convey the benefits of home ownership to Cassandra and Sammy, (2) the Lewises breached (i.e., "deviated significantly from") that agreement, and (3) Cassandra suffered damages as a result of the breach. *See id.* at 27-28. But these are the elements of a claim for breach of contract, not unjust enrichment. *See W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (stating elements of breach of contract). The consequence of the majority's flawed analysis is that Cassandra is awarded contract damages where no contract existed.

The trial court calculated damages by subtracting the remaining mortgage and the Lewises' $ 5,000 down payment from the sale price of the home. Maj. op. at 11. In other words, the court placed Cassandra in the position she would have been in had there been a contract to transfer ownership of the home to her, including awarding her full expectation damages such as the increase in value of the home due to market conditions. *See Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 251 (Colo. 2003) (defining contract damages in terms of expectation damages). But because she does not have such a contract claim, the trial court erred by awarding contract damages, and the majority errs by applying contract principles, under the guise of unjust enrichment, to uphold the trial court's award.

The majority comes up with its "mutual purpose of the parties" cause of action by "[b]orrowing from . . . diverse

jurisprudence," including trust and family law. Maj. op. at 23. Yet it ignores precedent precisely on point in the field of unjust enrichment. For example, in *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000), we examined an unjust enrichment claim strikingly similar to Cassandra's. In that case, plaintiff and defendant "agreed to build a home together" to serve as their residence. *Id.* at 1264. Plaintiff designed the home and paid almost $ 170,000 of the construction costs. *Id.* at 1265. Soon after they moved into the home, plaintiff quitclaimed his interest in the home to defendant, ostensibly so that she could obtain a favorable mortgage on the home and for the tax advantages. *Id.* After a little more than a year of living together in the home, defendant changed the locks and essentially evicted plaintiff. *Id.* Plaintiff brought an unjust enrichment claim against defendant.

In analyzing plaintiff's claim, we did not seek, as the majority does today, to discern a "mutual agreement of the parties," even though there was evidence that they had some sort of an agreement with regard to how the expenses would be shared. *See id.* Instead, we focused on whether plaintiff had conferred a benefit on defendant that was unjustly retained. We concluded that he had. Specifically, we found that he paid "nearly $ 170,000" toward construction costs of the home and expended considerable effort in "designing the home and managing the project." *Id.* at 1266. On remand, we instructed the trial court to "determine the exact worth of [plaintiff's] contribution [to building the home] to date, and the reasonable rental value for the periods [defendant] lived in the house." *Id.* at 1269-70.[1] In other words, we found that the proper measure of damages would be the net benefit unjustly retained by the

defendant -- that is, the "exact worth of [plaintiff's] contribution" to the home, less the "reasonable rental value" he would have paid to live there.

Applying *Salzman's* analysis (that is, the elements of unjust enrichment) to the facts of this case, the trial court should have determined what net benefit, if any, Cassandra conferred on the Lewises. For example, over the fourteen years of living in the home, Cassandra and Sammy paid $ 236 per month to the Lewises to cover the mortgage payment; paid the real estate taxes; paid the costs of maintaining the home, including homeowner's insurance; and paid for various improvements to the home. Maj. op. at 4-5. These are costs that Cassandra and Sammy paid that benefited the Lewises. On the other hand, Cassandra and Sammy received a place to live for fourteen years at far below market cost. *See Lewis v. Lewis*, No. 05CA1463, slip op. at 8 (Colo. App. Nov. 30, 2006) (not selected for official publication). As in *Salzman*, I would instruct the trial court to calculate the net benefit that Cassandra conferred on the Lewises, if any -- that is, the benefit she conferred on the Lewises minus the rent she would have paid at market value.[2] This calculation will necessarily require the trial court to determine what portion of the benefit should be attributed to Cassandra, as opposed to Sammy.[3]

Plainly, the effect of today's decision is to untether unjust enrichment from its central focus on the benefit conferred by the plaintiff on the defendant. The majority attempts to gloss over this fundamental shift in unjust enrichment law by stating that "the Lewises intended to give Cassandra and Sammy the benefits of home ownership, not reap those benefits for

themselves," the implication being that one of those benefits is the ability to sell a home for profit. Maj. op. at 27. However, it is irrelevant whether the Lewises intended to convey the benefits of home ownership, or any other benefits, to Cassandra. This is because, as discussed above, the centerpiece of unjust enrichment is the value of the benefit conferred *by Cassandra on the Lewises*, not the other way around. Consequently, the majority's consideration of the benefit intended to be conferred *by the Lewises on Cassandra* turns this fundamental rule on its head.[4]

In sum, the majority's analysis contravenes fundamental principles of the law of unjust enrichment. I therefore respectfully dissent from its opinion.

I am authorized to state that JUSTICE RICE and JUSTICE COATS join this dissent.

Footnotes

1We cautioned that plaintiff might not be entitled to recover the full value of his contributions to the home "given that the appraised value of the home just prior to completion was considerably less than its cost." *Salzman*, 996 P.2d at 1266 n.4; *see also Wimp v. Brasher, LLC*, No. 05CA0956, 2006 Colo. App. LEXIS 1802, 2006 WL 3028117 (Colo. App. Oct. 26, 2006), cert. granted, No. 07SC124, 2007 Colo. LEXIS 620, 2007 WL 1898612 (Colo. Jul. 2, 2007), cert. dismissed as improvidently granted 2008 Colo. LEXIS 247 (Colo. Mar. 7, 2008) (raising the issue of the appropriate measure of damages in an unjust enrichment claim when the benefit conferred through improvements to a home is greater than the value of the home). While we

left it to the trial court to quantify the benefit conferred, there is no question that we instructed the trial court to focus on the benefit conferred.

2As even the majority recognizes, we must review de novo "whether the trial court correctly understood the appropriate test for unjust enrichment." Maj. op. at 17. I would find that the trial court did not apply the appropriate test in this case.

3The majority does not account for the fact that Cassandra and Sammy paid costs jointly. Even under its own analysis, and assuming *arguendo* that the Lewises did indeed intend "to give Cassandra and Sammy the benefits of home ownership," maj. op. at 27, it follows that Cassandra must share any recovery with Sammy, the other beneficiary of the parties' "mutual purpose." In other words, even under the majority's analysis, Cassandra would not be entitled to recover the full sale price of the home.

4As our recent decision in *Brown Group* makes clear, in unjust enrichment, "[w]hether a party has been unjustly (or unjustifiably) enriched . . . becomes an issue only if it has been enriched by receiving a benefit at the expense of another." 182 P.3d at 691. Following *Brown Group*, I would find it unnecessary to reach the question that forms the bulk of the majority's opinion -- that is, whether the plaintiff must always show malfeasance on the part of the defendant, as required in *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 117 (Colo. 1998), in order to meet the requirement that retention of a benefit be unjust. *See* maj. op. at 19-21.

No. 96-1033.

SUPREME COURT OF THE UNITED STATES

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS, PETITIONER

v.

CONTINENTAL INSURANCE COMPANY

June 2, 1997, Decided

OPINION

PER CURIAM.

[1A]In this diversity case, the holding of the federal appellate court below has been called into question by a recent decision of the highest state court in Maryland. We must decide whether it is appropriate, in these circumstances, for this Court to grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration.

Petitioners, an association of condominium owners, sued respondent in Maryland state court, seeking to compel respondent to pay a $ 1.1 million judgment they had obtained against respondent's insured, the developer of their condominium complex. In a previous action, a jury had held the developer liable for numerous defects in the complex, finding that the developer had made misrepresentations and breached various warranty obligations. Respondent had issued a general liability insurance policy covering the

developer. The policy provided that respondent would pay "'those sums that [the developer] becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.'" App. to Pet. for Cert. 2a. Under the policy, "property damage" was covered only if it was caused by an "accident."

Respondent removed the action to the United States District Court for the District of Maryland, based on the parties' diversity of citizenship. The District Court granted summary judgment in favor of respondent. On August 6, 1996, the Court of Appeals for the Fourth Circuit affirmed. The Court of Appeals held that, as a matter of Maryland law, an "accident" does not include the "natural and ordinary consequences of a negligent act." *Id.*, at 4a (internal quotation marks omitted) (citing *IA Construction Corp. v. T&T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (1993) (quoting *Ed. Winkler & Son, Inc. v. Ohio Casualty Ins. Co.*, 51 Md. App. 190, 194-195, 441 A.2d 1129, 1132 (1982))). Because the damages awarded in the underlying action were for breach of warranties and misrepresentations relating to poor workmanship, the Court of Appeals concluded that the damages were not caused by an "accident" within the meaning of respondent's insurance policy. The Court of Appeals denied a petition for rehearing on September 3, 1996, and issued the mandate on September 11, 1996.

On September 17, 1996, petitioners' counsel learned of *Sheets v. Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A.2d 540, a recent decision of the Maryland Court of Appeals--the highest court in Maryland. (Although *Sheets* was handed down on July 26, 1996, 11 days before the Court of Appeals' decision, the parties were not aware of the decision until after the mandate was

issued, and therefore had not brought the case to the attention of the Court of Appeals. Pet. for Cert. 11.) *Sheets* cast doubt on the soundness of the Court of Appeals' decision because it held that "an act of negligence constitutes an 'accident' under a liability insurance policy when the resulting damage was 'an event that takes place without [the insured's] foresight or expectation.'" 342 Md. at 652, 679 A.2d at 548 (citation and internal quotation marks omitted). The Maryland Court of Appeals also expressly disapproved *Ed. Winkler & Son*, *supra*, 441 A.2d at 1132, and *IA Construction Corp.*, *supra*, at 1215, two decisions on which the Court of Appeals had primarily relied. 342 Md. at 654-655, and 654, n. 4, 679 A.2d at 549-550, and 550, n. 4.

On September 20, 1996, petitioners filed a motion asking the Court of Appeals to recall or stay its mandate based on this development in Maryland law. In its response, respondent argued in part that the Court of Appeals lacked authority to recall an already issued mandate. In a brief order, the Court of Appeals denied petitioners' request, ruling only that "the said petition and motions are without merit." App. to Pet. for Cert. 11a. Petitioners now ask us to grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration in light of *Sheets*. Pet. for Cert. 13-14.

[1B][2][3]This case fits within the category of cases in which we have held it is proper to issue a GVR order. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a

premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence* v. *Chater*, 516 U.S. (1996) *(per curiam)*. The situation here is virtually identical to that in *Thomas v. American Home Products, Inc.*, 519 U.S. , 117 S. Ct. 282, 136 L. Ed. 2d 201 (1996), a state-law case from earlier in this Term. There, after the Court of Appeals for the Eleventh Circuit ruled against petitioners, the Georgia Supreme Court overruled the holding that was the basis for the federal appeals court's holding. *Id.*, at (SCALIA, J., concurring). The appellate court nevertheless denied a petition for rehearing, and we GVR'd. As JUSTICE SCALIA wrote in concurrence, our order was in keeping with our "longstanding practice" of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court. *Id.*, at . "[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Huddleston v. Dwyer*, 322 U.S. 232, 236, 88 L. Ed. 1246, 64 S. Ct. 1015 (1944) *(per curiam)*.

[1C]Given *Sheets*' explicit disapproval of the cases on which the Court of Appeals based its decision, there is reason to question the correctness of the Court of Appeals' decision. It is true that petitioners brought *Sheets* to the attention of the Court of Appeals in a motion to stay or recall its mandate and that the Court of Appeals denied this motion. But the Court of

Appeals' ambiguous statement that petitioners' request was "without merit" does not establish that it actually considered and rejected petitioners' *Sheets* argument. In opposing petitioners' motion, respondent argued that a court of appeals lacks authority to recall its mandate, and the Court of Appeals may have rested its denial of petitioners' motion on this procedural ground. Respondent does not argue otherwise. Indeed, the procedural ground is by far the most likely, given *Sheets*' explicit repudiation of the precedent on which the Court of Appeals' original judgment hinged. Moreover, we have at least once before issued a GVR order where petitioners notified the federal court of appeals of an intervening state supreme court's opinion in a second petition for rehearing, which the court of appeals denied. See *Huddleston*, *supra*, at 235.

In these circumstances, we now grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration.

DISSENT BY: REHNQUIST

DISSENT

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BREYER joins, dissenting.

In *Thomas v. American Home Products, Inc.*, 519 U.S. , 117 S. Ct. 282, 136 L. Ed. 2d 201 (1996), the Court granted, vacated, and remanded a decision of the Court of Appeals for the Eleventh Circuit for reconsideration in the light of a decision of the Georgia Supreme Court that was handed down after the Court of Appeals had denied a petition for rehearing. The lower court there

had had no opportunity to consider the impact of the new state law decision.

Here, by contrast, *Sheets v. Brethren Mutual Ins. Co.*, 342 Md. 634, 679 A.2d 540 (1996), was expressly considered by the court below. Although *Sheets* was not brought to the attention of the Fourth Circuit until after it had rendered its decision and denied rehearing, petitioner raised it nonetheless before that court in a motion to recall or stay the mandate. Petitioner's motion did not fall on deaf ears; indeed, the Fourth Circuit went to the unusual lengths of requesting a response to the motion and then, after the response was received, issuing a written order rejecting the claim. The only question discussed in that order is whether "*Sheets* should have required a different disposition of this case than the [original] disposition." App. to Pet. for Cert. 10a. And the court resolved that question, concluding "we are of [the] opinion the said petition and motions are without merit." * *Id.*, at 11a.

If this Court has, without any briefs on the merits, concluded that the Court of Appeals' refusal to alter its opinion in the light of *Sheets* was wrong, it should either set the case for argument or summarily reverse. True, this would require the investment of still more time and effort in a case that is in the federal courts only by reason of diversity of citizenship, see *Thomas, supra*, at (REHNQUIST, C. J., dissenting), but it would have the virtue of explicitly telling the Court of Appeals how to dispose of the case. The Court's decision to grant, vacate and remand in the light of *Sheets*, on the contrary, is muddled and cryptic. Surely the judges of the Court of Appeals are, in fairness, entitled to some

clearer guidance from this Court than what they are now given.

Footnotes

*Although it is possible to construe this statement as being based on the procedural impropriety of raising such an issue on a motion to recall the mandate, such a construction is nowhere suggested in the order, nor is it the natural implication of the language ("without merit") used by the court below. I see no reason for us not to take the Fourth Circuit's order at face value.

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Jun 11, 2004

The Honorable Boyd N. Boland
United States District Court
United States Courthouse,
Room A105
901 19th Street
Denver, Colorado 80294-3589

Re: Jack J. Grynberg, Grynberg Production Corporations and its succesors, and Grynberg Petroleum CompaNy, and its successors v. Total S.A.; Civil Action No. 03-D-1280 (BNB)

Dear Judge Boland:

Following the hearing before the Court on June 3, 2004, concerning, the discovery motions pending in the above matter, counsel for Defendant, Total S.A ("Total"), have given a great deal of further thought to how to protect Total's confidential trade secrets information regarding; the Kashagan Field, North Caspian Sea, in Kazakhstan, and in turn to protect its critically important relationships with the Republic of Kazakhstan and the other members of the Consortium, and based on statements by Plaintiffs' counsel, made at the hearing, we would like to make the following suggestions regarding the parties' discovery disputes:

1. At the June 3 hearing, Plaiatifs' counsel clarified that Plaintiffs seek two types of information through discovery in this case: (1) information about how Total acquired its interest in the Kashagan Field, in order to determine if Total acquired that interest by means of technical data and contacts allegedly supplied by Jack Grynberg to Total in July 1990; and (2) information concerning the current value of Total's interest in the Field, so that Plaintiffs, can quantify a damages claim for Total's alleged refusal to share its interest with Plaintiffs. These two categories of information provide a reasonable, workable starting point an which the Court can base its rulings on the parties' motion.

2. The history of how Total acquired its interest in the Kashagan Field can best be told by those persons directly involved at Total. Most of the key persons in that effort are still with Total, even though these events occurred more than ten years ago. Total will make every effort to make these persons available for their depositions its Paris this Summer. (The Summer vacation plans of these Total employees may make it difficult to arrange for them to be available in the same week.) We are checking on their availability and will work with Plaintiffs' counsel to set this up. To avoid the expense of multiple trips to Paris, Plaintiff's may want to take these depositions by videoconferene. Total has such facilities.

3. In addition, to help present the history of this venture, Total will provide Plaintiffs with the seismic base map that shows the entire seismic campaign which was undertaken by the Consortium that led to the discovery of the Kashagan Field. All of the huge number of seismic lines shot by the Consortium in the

Caspian Sea are shown and. identified by line number on this map. With this map, Plaintiffs can see for themselves the location and extent of the Consortium's seismic program and the extent, if any, to which Total " zeroed in" on the Kashagan Field thanks to information allegedly supplied by Jack Grynberg. Providing this map eliminates any legitimate need for the seismic data itself, which is highly confidential and is owned by the Republic of Kazakhstan, not Total. Significantly, one there is a protective order in place covering the Consortium Agreement, Plaintiffs will see that this agreement imposes obligation on Total and the other Consortium members to acquire seismic over the entire Kazakh sector of the Caspian Sea., Plaintiffs do not need to see any technical data concerning the Kashagan Meld, other than the seismic base. map, which together with the depositions of the Total personnel insurumernta! in Total's early participation in this immense pre ect will answer the first question Plaintiffs' ask in this case: How did Total come to acquire its interest?

4. As the Court will recall, the second question Plaintiffs ask in this case concerns the value of Total's interest. Plaintiffs apparently assert a claim for monetary, damages, even though the letter agreement that Plaintiffs allege Total entered into only purports to offer Plaintiffs a percentage interest in "the shared Western [companies] interest"' in opportunities in the described Area of Mutual Interest ("AMI"). And Plaintiff's make this claim even though the Field is only in the development phase, no pipeline is connected to the Field, and commercial production is not expected to occur for several years. Moreover, Plaintiffs assert, in the alternative, a claim for unjust enrichment even

though Total has not been enriched by one dollar to date, but has itself expended billions of dollars on the exploration and development of this Field, so far without economic return. For these and other reasons, Total intend to file a motion to dismiss Plaintiffs' claim for monetary damages for failure to state a claim and/or on the grounds that as a matter of law Plaintiffs are not entitled in these circumstances to recover monetary damages.

5. Total does not suggest that this Court decide the benefits of such a notion to dismiss in connection with the current discovery dispute. However, in balancing Plaintiffs' ostensible need for highly confidential technical information concerning the value of Total's interest in the Kashagan Field with Total"s need to protect the confidentiality of this information and its relationships with the Republic of Kazakhstan and other Consortium members, the Court should take into account that the alleged letter agreement between the parties only provides that Plaintiffs will be offered 20% of "'the shared western interest" in opportunities the AMI. Determination of Plaintiffs' entitlement to that interest does not require any information about the value of the Kashagan Field. Furthermore, the Court should take into account Plaintiff's' difficulty in stating a claim for unjust enrichment by Total with respect to a project into which Total continues to invest billions of dollars without any assurance of any return on its investment, when the Field is still in the development phase, there is not a pipeline connection, and commercial production is years away.

6. As an interim alternative to denying Plaintiffs' request for this highly confidential information

regarding the value of Total's interest, the Court can exercise its inherent discretion to bifurcate this case into separate trials on liability and damages. In this way, the Court would protect the confidentiality of this information, at least for the time being, while preserving the possibility of its disclosure at a later date, if Plaintiffs' claims survive the motions to dismiss and for summary judgment filed, and to be filed, by Total and a trial on the issue of liability. Bifurcation would offer one additional benefit, which the Court may want to take into account: the District Court has set aside only five days for the trial in this cause, when many more days will be necessary if this case includes a hotly contested trial over the value of Total's interest, which Plaintiffs have asserted in their Complaint is worth more than $20 billion. Accordingly, the Court should bifurcate the case into liability and damages trials, with the current trial date of April 25, 2005, retained for the initial trial on liability. By bifurcating the case alone these lines, the Court will simply conform the proceedings to the two questions that Plaintiffs' have indicated form the core of their case. (We recognize that the ultimate decision on bifurcation will be for Judge Daniel, and so we ask that you consider recommending bifurcation to him. We will file an appropriate motion.)

7. Only in the event that the Court determines that Total should disclose confidential information regarding the Field and Total's interest in it, Total also urges that the Court enter a protective order that restricts access to this confidential information to Plaintiffs outside counsel and outside experts. To protect the confidentiality of this information, it should first be reviewed at the offices of Total's Denver counsel, and if

based on that review Plaintiffs want additional access to it, a copy of the information should be kept at the office of Plaintiff's' outside counsel. Copying of thisthis information, except for submission to the Court, should be prohibited. This information should not be taken from the office of Plaintiffs' outside counsel and any copies filed with the Court should be filed under seal. Only in this way could the confidentiality of this information be safeguarded from disclosure, misappropriation, and misuse.

8. Finally, we would light to comment briefly on the request which Plaintiffs' counsel appeared to mare at the hearing on June 3 that Total disclose the identity of its trial witnesses in the near future so that Plaintiffs can determine whether they on to go to the trouble of trying to subpoena non-U.S. citizens residing outside the U.S. for deposition. Without commenting on whether Plaintiffs can, in fact, compel persons who are not now employees of Total for depositions where they live and work in and are citizens of France, Total objects to identifying its trial witnesses other than in the Joint Pre-Trial Order, It would certainly be extremely premature for Total to make such determinations at this time with discovery barely underway and the trial not for 10 months.

IN THE DISTRICT COURT
FIFTH JUDICIAL DISTRICT
Civil Action No. 24616
STATE OF WYOMING
COUNTY OF PARK

CELESTE C. GRYNBERG, Plaintiff,

vs.

GAS VENTURES LIMITED LIABILITY COMPANY. Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Gas Ventures Limited Liability Company (hereinafter "Gas Ventures") by and through its attorney, Thomas F. Reese, of Brown Drew Massey, LLC and for its Memorandum in Support of Motion for Summary Judgment sets forth as follows:

Facts

In 1979 Jack Grynberg was an owner of a federal oil and gas lease, No. USA W45216 (hereinafter "Lease"). Jack Grynberg entered into a Farmout Agreement with General American Oil Company of Texas (hereinafter "General American's, a copy of the documents which create the farmout are attached as Exhibit C and D (Farmout Agreement) to Mr. J.B. Roden's Affidavit (hereinafer "Roden Affidavit"). General American, pursuant to the Farmout Agreement, drilled the Wiley 1-20 well, the test well referred to in the Farmout Agreement and earned interests in the Lease. Celeste

C. Grynberg is the successor in interest to Jack J. Grynberg under the Farmout Agreement and Lease. Gas Ventures was the eventual successor in interest to General American under the Farmout Agreement. Gas Ventures succeeded to the ownership and operatorship in April, 2000.

Mr. Grynberg assigned to General American 100% of the operating rights from the surface to a depth of 4,568 feet or the stratigraphic equivalent thereof in the Wiley 120 well, in the NE/4SW/4 of Section 20, Township 52 North, Range 100 west, 6th P.M., Colorado, recently held that the Mr. Grynberg's claims were time barred because they accrued when Mr. Grynberg should have discovered that the Defendants had breached their duties to the Plaintiffs. Grynberg v. Shell Exploration B. V., et, al., 433, F. Supp. 2d 1229 (D. Colo. 2006).

Since Plaintiff here contends that payout was in 1984, then her cause of action accrued in 1984 and under no Wyoming statute of limitations could there still be a claim by her for payout. See also, Grynberg v. Total Compagnie Francaise des Petroies, et, al., 2006 U.S. Dist. Lexis 35035 (D. Colo. 2006) (Claims for profits barred by statute of limitations even though no profits generated at time suit was filed.) In addition, Plaintiffs claim that Gas Ventures is not the operator is barred by the Statute of Limitations. Goldmark acted as operator under the JOA and was recognized as such by Plaintiff by her silence and her execution of the Division Order (Roden Affidavit, Exhibit A).

Estoppel

If this Court decides that the statute of limitations does

not apply, then applying the doctrine of estoppel this Court should grant summary judgment to Gas Ventures. The Wyoming Supreme Court in Kincheloe v. Milatzo, Docket No. 83-100, decided February 22, 1984, expressly accepts the doctrines of promissory estoppel in Wyoming. In 28 Am. Jur. 2d, 49 p. 660, "Estoppel and Waiver", it is noted that courts have held that the application of promissory estoppel to commercial transactions is expressly favored. And further in Am. Jur. 2d, supra, at § 52, p. 663, it is noted that,

> A party may be estopped to insist upon a claim, assert an objection, or take a position which is inconsistent with an admission which he has previously made and in reliance upon which the other party has changed his position.

Even were the Plaintiff not estopped by her own actions in this matter, her inaction would, in itself, create such an estoppel. Am. Jur. 2d, supra, § 53, p. 666 states that,

> Estoppel by silence or inaction is often referred to as estoppel by "standing by"... the principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent'... Moreover, there are cases where the mere silence of the estopped party and his failure to assert the right later claimed will be construed as a representation that he does not have the rights which he

cross motion for summary judgment to strike

defendants' laches and limitations authority.

Let me hear some brief argument on that motion.

MR. JATKO: Just a couple of things. I want to -- Judge, I've got some materials if the clerk could hand them to you; you can consider them your own copies. I hate to give you paper, but in my preparations these last few day, I wanted to emphasize some of the materials here.

And the first thing, there is a case I found just this last week which is -- get the name of it -- I'm only looking at the last page for the purpose of this argument.

THE COURT: It's a Second Circuit case, that much I see.

MR. JATKO : That's correct, I see.

COURT: Golden Pacific Bancorp versus FDIC.

JATKO: Yes, sir.

THE COURT: How does this case have any relationship to this case?

MR. JATKO: Page 10. Highlighted section. I'm not too good with this screen, but it's on there. And it's really the last highlighted section I want to direct the Court's attention to with a brief explanation.

This is an unjust-enrichment case, and that's what this case is, at least in one of the claims.

The confusion often arises, and the court here, the

Second Circuit here, sorted it out in the headnote 22. The claim doesn't arise until there's an enrichment. The point I'm trying to make: To date -- and this is the second item I want to refer you to in the little folder -- even Total admits, Total has not been enriched to date. This is a letter here, it's from my colleague Mr. Bowman, and there's highlighted section in it that points out at page 2, if you haven't got an enrichment, you haven't got a claim for unjust enrichment. To me that only makes sense, and the Second Circuit certainly agreed with it; and when the defendant admits that there's been no enrichment to date, that was 2004, then if I put that together with the Second Circuit rationale, it makes sense to rye that I'm lucky I'm not here arguing our case is premature. In fact, Total has earlier stated that they intended to make such a motion. Far from being stale, the case, in a theoretical sense, could be looked at as premature because of the lack of enrichment and the cases that -- the best case 1 was able to find was that Second Circuit one which I've given you.

THE COURT: Are you saying, then, that because the defendants haven't cashed in on their investment, there is no unjust enrichment; is that what you're saying?

MR. JATKO: In a way, yes, I am. The enrichment has not occurred. Total. agrees with that position. At least their counsel states that.

And so what is -- this gets back to one of the brief comments I made in the earlier motion. This whole thing is about oil. Sure, there were rights granted to different people along the way. But until there's oil, there's nothing in the case. And how -- what Total

would have you hold, as I say, while Mr. Grynberg and his companies, whoever, could bring a lawsuit before there's oil found and recover essentially nothing and then be barred from bringing a lawsuit when the oil is actually discovered. This doesn't make sense to me, and I don't think it should make sense to the Court.

And on the point that Mr. Bowman raised about whether or not there's evidence, you'll see in that folder, there's

THE COURT: wait a minute. If there's no unjust enrichment, why did Mr. Grynberg file a claim?

MR. JATKO: Because in 2002, these files were finally proved out, and you'll show that in the motion, that the material there are clear, there was public knowledge in 2002 that these wells were of a commercial -- were worthy of commercial. development.

Now, until that time, people thought there was oil. People believed there was oil to the tune of billions of dollars of expenses. But until the oil is there -- and I might point out one other thing --- there was no way for rynberg and the plaintiffs to get paid except as a percentage of production, Judge. He didn't get any reimbursement, he didn't have any hourly rate, he didn't have any finder's fee. The only deal made was for production And as Total has pointed out, there hasn't been any production yet. This is why I say there's a risk the case was premature. I don't think it is because we've got experts now, they say the field has been developed, commercially, they can estimate what production will be. It's for a jury to determine if those estimates are accurate.

But the point, what we've been arguing about here literally for months through piles of motions, doesn't seem to one to make any sense at all, because what Total wants you to do is throw a case based on oil production out before production is even proved. How can that make sense?

As far as we -- as far -- John must have thought I was through there. I got just a couple minutes.

As far as the memos showing, I didn' t -- I brought these memos in my folder because I wanted, to show the court that these internal memos, two of which have been filed in previous summary-judgment affidavits, one by Mr. Grynberg, the other of which is a production by Total with a Total Bates number on it, these are highlighted as well.

Three different gentlemen within Total. There's Mr. Laharrer, Mr. Duval, and the last one escapes me for the moment, but his name is highlighted, Mr. Gerard. These memos, these are back from the days of right after the meeting in 1990. There's the memos that Mr. Porter was talking about. We couldn't get -- we had no access to these kind of documents until the case was filed.

THE COURT: Let me ask you a question. I mean, isn't the essence of Mr. Grynberg's claim that he was denied the production rights to these properties which are in the Caspian Sea?

MR. JATKO: He was denied the production rights –

THE COURT: Right, because he was excluded from this deal due to the alleged wrongful, conduct of the defendants. I mean, to the extent that there's a group that's developing, has developed oil and gas interests in this area of the world and they spent money to put same rigs in place and to explore for oil, they have entitlements to recover whatever oil is recovered. But they've spent money and they've got the right to proceed with the production.

I mean, isn't that something that Mr. Grynberg viewed as valuable, based on his prior communications?

Mr. JATKO; Yes, sir, it is.

However, this case initially started with a contract claim, a conversion claim, and a fraud claim. Those claims were dropped out. And what was left before is you an unjust-enrichment claim which is difficult. Unjust enrichment doesn't even require finding of fault. It requires a finding that there has been an unjust enrichment, but it certainly requires at least that. And that's the purpose of this cross motion, to draw to the Court's attention

THE COURT: What are you asking me to do by this motion? I'm confused by this motion. What are you asking me to do?

MR. JATKO: I doubt very much that you're confused.

THE COURT: What are you asking me to do?

MR. JATKO : Under the rules a partial summary judgment can be granted

THE COURT: No, no, I understand; but what relief are you specifically asking me to grant you through this motion?

MR. JATKO: To take this waste of time arguing about summary judgment over and over again out of the case, that's what I'm asking you to do.

THE COURT: Yeah, but Rule 5 gives parties --- I don't like summary-judgment motions. I think they're abused -- I'm not accusing present counsel. -- they're abused, misused and extensively overdocumented in civil litigation in our courts, but the rule provides an opportunity to do that because the rule exists.

MR. JATKO: And when we go to trial, we're going to hear it again, we're going to have another stack of paper equally high. I'd like to get it out of the case. I don't see the point of throwing out a case based on oil production before there is any production. I cannot see that, Judge.

THE COURT: You filed a motion for unjust enrichment. To the extent that the defendants argue that that claim is not ripe because of laches, statute of limitations, or anything else, you're saying I shouldn't consider their arguments because nobody's cashed in a big pay check from these production activities.

MR. JATKO: That's right. What they've got now i they've got proof, scientific proof that this is a commercial strike of oil. That came in 2002. One year before this case was filed. The documents are all before you in the motion.

THE COURT: To me the logic of your argument is I should say your unjust-enrichment claim is premature, if it has to be preceded by an actual find of substantial amounts of petroleum.

MR. JATKO: I'm not afraid of that ruling. I'm just telling you, I think we have a --- I don't think it's premature because 1 think we have a substantial, documentable expert-evidence claim. But what I'm telling you is there has been no enrichment and Total admits it.

THE COURT: Well, let's do this. I have to end this in a few minutes here, but the Court's enjoying this conversation nonetheless.

If someone is sued on claims, whatever the claims might be, and if under the law there is a valid statute-of-limitations argument to be made, why don't the defendants have a right to make that argument? Now, it's up to the Court to decide if it has merit. And as you know, there is one prior motion filed for statute of limitations, I denied for the reasons noted, and this new motion has been filed and now I have new information. So I don't remember your side raising this issue on the first motion. Now

MR. JATKO: That's right. I didn't raise it. I should have. I didn't raise it because I answered and I thought I fully answered the motion filed against us. I didn't want to go into it and I thought the thing was done.

So now here we have it again.

So this time, I'm not going to make that same mistake. I'm going to get it before the Court and be sure that you understand that this case is thrown out, it's a case based on 20 percent of production which is thrown out before any production occurred. And I think that's a, would be an unreasonable holding.

THE COURT: Do you have any oil and gas case where a court has concluded that someone who has the right to production doesn't have an entitlement to a claim until the production hits pay dirt?

MR. JATKO: I'm not saying he doesn't have a right to I'm the same that this is an unjust-enrichment case. I'm saying that the Second Circuit answers many of your questions when they attempt to define -- I just put an arrow in there.

THE COURT: And again, you just gave it to me; I have to read it, and I'm not going to be rushed to read it.

MR. JATKO: I don't want you to do that.

THE COURT: I do see what it says as I look at page 10 of this.

MR. JATKO: It says that when -- basically, I can sum it up of what I think it says. That there could be some wrongful acts in the past, but the duty in an unjust-enrichment case arises when there is a duty of restitution. So in other words, and I guess I could technically say Total, when it gets production, ought to pay Grynberg or else we have a lawsuit.

THE COURT: Well, one thing that concerns me about the Second Circuit case, it just says here, under New

York law; I don't know if New York law and Colorado law are the same. I would suspect that need to look at Colorado law to see

MR. JATKO: Well, let me tell you one thing; if it were six years, like in New York, we wouldn't be here today. That's a big difference; it's a three-year statute here. But the point is there is no difference between the law of unjust enrichment in New York and Colorado.

THE COURT: All right. I need to look at this. What else are you seeking? Are you seeking to eliminate their statute-of-limitations defenses as well?

MR. JATKO: I'm seeking to -- a partial summary judgment to eliminate the affirmative defense of statute of limitations.

THE COURT: Why?

MR. JATKO: Because I don't think that it applies to the claims before you.

THE COURT: And why doesn't it?

MR. JATKO: I think it gives them an opportunity to put on two or three days of jury argument about -- prejudicing my client about haw he delayed when I've already told you, today, I don't think Mr. Grynberg delayed in this case at all. I think it's the project that took a long time. And that's borne out by the fact that nobody's made a dime over there yet, in the last 15, 16 years. Judge, they're not even expecting production until 2008.

THE COURT: So why did Mr. Grynberg file a lawsuit in 2003?

MR. JATKO: Because he's ready to file a lawsuit at the drop of a hat.

THE COURT: I know that.

MR. JATKO: And everybody in here knows that.

THE COURT: I understand that. What I'm saying, you seem to be suggesting that his claims aren't ripe for adjudication if there's no production that's realized for another two years.

MR. JATKO: Let me just say, that's a risk I run, bringing this up. I don't think -- I think it's worth it because I think we could show you, if we were faced with such a motion of prematurity, we could show you it's not premature because of the scientific confirmation of commerciality and the expert evidence we have saying what future production will bring.

THE COURT: Okay. I understand your argument.

MR. JATKO: All right. Thank you, sir,

THE COURT: Brief response.

MR. BOWMAN: Your Honor

THE COURT: So, Mr. Bowman, are you withdrawing your statute-of-limitations and unjust-enrichment defenses?

MR. BOWMAN: Absolutely not, Your Honor.

THE COURT: All. right.

MR. BOWMAN: We think they're very valid defenses and we hope you will agree with us.
The injury that was suffered occurred when Total acquired the interest in the PSC. If the Court would care to, the first amended complaint of the plaintiffs, in paragraph 11, I think makes this point eloquently itself.

THE COURT: Didn't I read this earlier?

MR. BOWMAN: You may have.

THE COURT: I read that earlier. I know what it says.

MR. BOWMAN: It says --

C. Bancorp's Unjust Bancorp's Enrichment Claim Based On The FDIC's Payment Of Post-Insolvency Interest To Itself Is Timely In Any Event Because Bancorp's Claim Was Brought Within Six Years Of Such Payment.

Bancorp's unjust enrichment claim is timely for an additional reason. The gravamen of this claim is that the FDIC unlawfully paid itself over $11 million in "post-insolvency interest" at the expense of Bancorp's shareholders. See J.A. 9092. Wholly apart from the reasons discussed above, this claim is timely because it was brought within six years of the date on which the FDIC made its first payment to itself.

To prevail on a claim for unjust enrichment under New York law, a plaintiff must establish that: (1) the defendant was enriched; (2) (the enrichment was at the plaintiff's expense; and (3) the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff. State v. Barclays Bank of New York, 563 N. E. 2d 11, 15 (N.Y. 1990); Universal City Studios, Inc. v. Nintendo Co., 797 F. 2d 79 (2d Cir.), cert. denied, 479 U.S. 987 (1986). As discussed, the statute of limitations for unjust enrichment claims Is six years. Niagara Mohawk, 696 N.Y.5.2d at 603; Congregation Yetev, 596 N. Y. S.2d at 437; fit. N. Y. C. P. L. R. Sec. 213(1). Generally, the limitations period for such claims "starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution." Congregation Yetev, 596 N. Y. S. 2d at 435.

Here, the "wrongful act giving rfse to a duty of restitution" was the FDIC's payment of interest to

itself. That is clear because, until it actually paid itself such interest, the FDIC could not have had a duty to pay it back. In other words, Bancorp did not have a claim for restitution of post-insolvency interest until the FDIC in fact took that interest from the receivership estate. Thus, Bancorp's unjust enrichment claim based on past-insolvency interest did not accrue until the FDIC paid itself such interest.

The FDIC made payments of post-insolvency interest to itself on March 15, 1991, and April, 14, 1994. J.A. 225. Bancorp's unjust enrichment claim therefore did not accrue until March 15, 1991, at the earliest. Because Bancorp brought its unjust enrichment claim an October 31, 1995 -- well within the six-year statute of limitations -- its clam is timely.

The District Court based its contrary conclusion on the erroneous premise that Bancorp's unjust enrichment claim for post-insolvency interest accrued at the same time that the interest itself purportedly accrued. See J.A. 2119. The court reasoned that because a substantial portion of interest claimed by the FDIC had purportedly accrued by January 1989, Bancorp's unjust enrichment claim was time-barred That approach is plainly wrong under New York law, where the limitations period for unjust enrichment "starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution." Congregation Yetev, 596 N.Y.S. 2d at 435.

The accrual of interest simply cannot be the "wrongful act" that triggered the running of the statute of limitations on this claim, because until the FDIC actually paid itself interest, it had not taken any "money

or property" that "equity end good conscience" would require it give back. See Alko Mfg. Co, v. Neptune Meter Co., 209 N. E. 2d 819, 820 (N.Y. 1965) (dismissing unjust enrichment claim for failure to allege that defendants received profit or property rightfully belonging to the plaintiff) ; Fandy Corp. v. Chang, 707 N. Y. S. 2d 361, 361 (N.Y. App. Div. 2000) (dismissing unjust enrichment claim for lack of showing that defendant obtained a benefit that rightfully belonged to plaintiff Barclays Bank, 563 N.E. 2d at 15 ("an action not based upon loss is not restitutionary"); Baratta v. Kozlowski, 464 N. Y, S. 2d 903, 810(N.Y. App. Div. 1983) (enrichment must be either the receipt of money or its equivalent, or being saved from expense or loss). Instead, the FDIC's payment of interest to itself gave rise to "a duty of restitution, triggering the statute of limitations.

More fundamentally, Bancorp's claim could not have accrued at the time interest allegedly began accruing because the FDIC could not even have claimed a right to pay itself interest at that time. According to the FDIC itself, post-insolvency interest may be said only if sufficient funds remain in a receivership estate after principal claims are paid in full. J.A. 224. Here, the claims against the receivership were not fully satisfied until January 10, 1998. J.A. 223-224. Thus, it was not until It became apparent that the receivership would result in a surplus of more than $16 million that the FDIC could have even purported to assert a claim far interest.

Even so, Bancorp's claim did not accrue until March 15, 1991, at the earliest. Until then, it could not be known for certain whether the FDIC would in fact pay itself

interest. Bancorp could not be expected to file suit in the face of such uncertainty. Indeed, any attempt to do so would no doubt have been rebuffed as premature. See, e.g., Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev, Comm'n, 461 U.S. 190, 203 (1981) (claim not ripe where it was uncertain whether agency would take particular action).

Bancorp's claim -- brought well within six years of the date on which the FDIC made its first payment to itself -- is therefore timely. In holding otherwise, the District Court plainly erred. [14]

fn14 For similar reasons, the District Court erred in dismissing Bancorp's other claims based on the FDIC's payment of post-insolvency interest to itself, as well as Bancorp's claims based on expenses the FDIC improperly charged to the receivership within six years of this lawsuit. For instance, the FDIC did not breach its fiduciary duty with respect to post-insolvency interest until it actually paid itself, since it was the payment of such interest that injured Bancorp.

Docket No. 00-6208 L, 00-6258 (CON)
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GOLDEN PACIFIC BANCORP,
Plaintiff-Counter-Defendant-Appellant,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION
Defendant-Counter-Claimant-Appellee.

August 7, 2001, Argued
December 7, 2001, Decided

***

The District Court improperly conflated the accrual of the cause of action with the accrual of post-insolvency interest. The statute of limitations for a claim of unjust enrichment begins to run "upon the occurrence of the wrongful act giving rise to a duty of restitution." *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 596 N.Y.S.2d 435, 437 (2d Dep't 1993). The wrongful act giving rise to restitution here was the FDIC's *payment of interest* to itself. The mere *accrual of interest* does not unjustly enrich the FDIC nor does it *accrue the cause of action.* Rather, the accrual of interest simply designates a starting point for calculation. The cause of action did not accrue or become more than speculative until the FDIC began to pay itself interest on March 15, 1991. Indeed, before that point, the FDIC had neither been enriched nor possessed any of Bancorp's "money or property" that "equity and good conscience" would require it to return. Accordingly, Bancorp's claim for unjust enrichment brought before March 15, 1997 was timely.

III.

To summarize:

1. It is unclear whether the release covers plaintiff's claims against the FDIC for unjust enrichment, breach of fiduciary duty, waste of corporate assets, and an accounting in the management of the receivership. The extrinsic evidence, when viewed in the light most favorable to the plaintiff, is ambiguous and creates a genuine issue of material fact as to whether Bancorp intended to release the FDIC.

2. The statute of limitations does not bar Bancorp's claims as a matter of law because the limitation period did not begin to run until the receivership terminated.

For the reasons stated above, we vacate the June 16, 2000 judgment of the District Court and remand the cause to the Court for further proceedings consistent with this opinion.

U.S. Const.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 4 - 2009
OFFICE OF THE CLERK

No. 08-851

IN THE

Supreme Court of the United States

JACK J. GRYNBERG, GRYNBERG PRODUCTION CORPORATION, AND ITS SUCCESSORS; GRYNBERG PETROLEUM COMPANY, AND ITS SUCCESSORS, PETITIONERS

v.

TOTAL S.A. AND SHELL EXPLORATION B.V. AND SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. F/K/A SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF

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NEW MATTER

Pursuant to Rule 15(8) of the Rules of the Supreme Court Petitioner Grynberg files this Supplementary Brief to bring to the Court's attention the following new matter:

Redd Iron, Inc. v. International Sales & Service Corporation, 2008 Colo. App. LEXIS 2178 (hereafter "*Redd Iron*") (attached hereto at App 1a) was decided by the Colorado Court of Appeals on December 24, 2008. The opinion was first available in Westlaw, most recently in LEXIS, and has not yet been published in the state's official reports. It was not available to counsel at the time the Petition for a Writ of Certiorari was filed.

The plaintiff in *Redd Iron* brought an action for, among other things, unjust enrichment. The parties filed cross-motions for summary judgment and judgment on the pleadings. The trial court ordered judgment on the pleadings in favor of the plaintiff on its unjust enrichment claim. The Colorado Court of Appeals vacated the judgment and remanded the case for factual findings consonant with the earlier opinion of the Colorado Supreme Court in *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008) and related Colorado authority, exactly as Petitioner has argued should happen here in their Petition for Certiorari.

STATEMENT and ARGUMENT

1. Questions Under Review

The decision under review in this Petition is that of the Court of Appeals for the Tenth Circuit in *Grynberg v. Total, S.A.*, 538 F.3d 1336 (10th Cir. 2008). Petitioner has presented two claims of error, each independently calling for this Court to issue an Order of GVR. The second of the two arose from the Court of Appeals' failure to consider a controlling opinion of the Colorado Supreme Court which was issued after the arguments in *Grynberg v Total, S.A.* had been heard but eight days before its decision was issued by that Court. *Lewis v Lewis* was therefore the law of the state of Colorado at the time of the decision, despite the fact that it had not come to either Petitioner's or the Court of Appeals' attention at that time. Neither "new" case was followed by the Court of Appeals below. Had it done so, it is beyond likely that Colorado law correctly applied, would have resulted in a finding that Petitioners claims have not yet accrued, and so cannot be barred by limitations or laches. In short, following Colorado law would completely change the outcome of this litigation.

In *Grynberg v. Total, S.A.* the Court of Appeals affirmed two decisions of the federal District Courts which had granted the defendants' motions for summary judgment, dismissing Grynberg's claims for unjust enrichment on limitations (or laches), applying a Colorado three year bar from the date of accrual of the action.

In its Petition Grynberg argued (Petition at 9-11 and 23-26), that the decision in *Lewis* cast doubt on the Court of Appeals' interpretation and application of state law in this case. Specifically, under the rule announced in *Lewis*, summary judgment was improper without the "particularized factual investigation" of the circumstances giving rise to the unjust enrichment claim. Had the Court of Appeals considered *Lewis*, a remand to the District Court requiring that factual consideration would have been required. *Redd Iron*, the new matter, illustrates the need for and the scope of the required remand. The effect of following state law correctly as set out in *Lewis* and *Redd Iron* would be to reinstate Petitioner's cases in the District Courts, and a finding that the claims have not accrued, and so cannot be time-barred.

2. The New Case: *Redd Iron, Inc.*

In the *Redd Iron* case, the trial court granted the defendant's motions for summary judgment, as in this case. The Colorado Court of Appeals reversed, and remanded on the basis of *Lewis* "to permit the court to consider whether, under the standards set forth below, Redd is entitled to recovery on this claim..." i.e. whether a claim for unjust enrichment had accrued.

The Colorado Court of Appeals in *Redd Iron* concluded by stressing once again what both a trial court and an appeal court are obligated by post-*Lewis* law to do: [APP.p. 17-18a]

> [W]e cannot determine as a matter of law that Redd will be unable to show that other circumstances would render defendants'

> retention of the benefits unjust. Such a determination requires a "highly fact-intensive inquiry," . . . and that inquiry is within the province of the trial court, not this court.
>
> Accordingly, we vacate the judgment in favor of Redd on its unjust enrichment claim and return the case to the trial court with directions to determine, under the standards set forth above and after consideration of such additional argument and evidence as the court may require, whether the elements of unjust enrichment have been established. The trial court is also to make findings of fact sufficient to explain the basis for its determination.

While *Redd Iron* is a decision of the Colorado Court of Appeals, and not of the Colorado Supreme Court, it robustly underscores Petitioner's argument in the present case, that had the Tenth Circuit considered *Lewis v. Lewis*, it would have recognized that it should have reversed the judgments of the District Courts below, remanding the cause for the "intensive factual investigation" the *Lewis* opinion requires as a matter of Colorado law. Their failure violates the principles of federalism established by this Court.

3. Based on the Above, GVR Must be Granted

The importance of the new matter to Grynberg's Petition in this case is clear. Grynberg has asked that this Court grant *certiorari*, vacate the judgment of the Court of Appeals, and remand the case to that Court with instructions to proceed in a way consistent with

the principles of diversity jurisdiction that require its attention to the state law announced in *Lewis*.

In *Lords Landing Condominium Council v. Continental Insurance Co.*, 520 U.S. 893, 117 S.Ct. 1731, 138 L.Ed.2d 91 (1997) this Court granted *certiorari*, vacated the Court of Appeals' judgment and remanded the case for further proceedings consistent with the newly applicable state law (*i.e.*, the Court issued an order of GVR):

> This case fits within the category of cases in which we have held it is proper to issue a GVR order. 'Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.'

The Court noted that the circumstances in *Lords Landing* were virtually identical to those of *Thomas* v. *American Home Products, Inc.*, 519 U.S. 913, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996), in which GVR was likewise ordered, and in which Justice Scalia noted the Court's "'longstanding practice" of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court,'" citing in turn *Huddleston* v. *Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944) *(per curiam)*. In *Huddleston* the Court noted the

fundamental principle of federalism in diversity cases, *viz.* the federal courts' "duty . . . to ascertain and apply the state's law" correctly. The standard applied in Huddleston was that the implicated state court decision "has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination . . ." 322 U.S. at 237. "GVR" is then the proper remedy so long as the case remains *sub judice* – as it is when the state court opinion predates (as it did in *Lords Landing* and in the present case) the judgment of the Court of Appeals. This Court, the opinion in *Huddleston* notes, need not address the issues of state law itself; but should require that the lower federal courts do so. Hence, the appropriateness of an order of GVR. And see *Lawrence v. Chater*, 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (*per curiam* 1996), elaborating on the authority for and advantages of the practice of ordering GVR.

CONCLUSION

The new matter of *Redd Iron, Inc.* sharpens and illustrates the necessity for an order of GVR because it shows much more clearly than Petitioner's brief that the Court of Appeals failed to follow Colorado law in this diversity case. Wherefore, Grynberg again respectfully requests that this Court grant his petition, vacate the judgment of the Court of Appeals, and remand the case to that Court with instructions appropriate to effect the principles of diversity jurisdiction and the controlling law of the State of Colorado.

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Court of Appeals No. 08CA0025

COURT OF APPEALS OF COLORADO,
DIVISION FIVE

Redd Iron, Inc.,
Plaintiff-Appellee,
v.
International Sales and Service Corporation, d/b/a Commercial Building Services, Inc., and ALSCO, Inc., d/b/a Steiner Corporation,
Defendants-Appellants.

December 24, 2008, Decided

NOTICE: THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

City and County of Denver District Court No. 06CV7908. Honorable R. Michael Mullins, Judge.

COUNSEL: Bloom Murr & Accomazzo, P.C., Joseph A. Murr, Daniel R. Delaney, Denver, Colorado, for Plaintiff-Appellee.

Benjamin, Bain & Howard, LLC, Alvin M. Cohen, Greenwood Village, Colorado, for Defendants-Appellants.

JUDGES: Opinion by: JUDGE VOGT. Russel and Gabriel, JJ., concur.

OPINION BY: VOGT

OPINION

Defendants, International Sales and Service Corporation, d/b/a Commercial Building Services, Inc. (CBS), and ALSCO, Inc., d/b/a Steiner Corporation (ALSCO), appeal the trial court's judgment in favor of plaintiff, Redd Iron, Inc., on Redd's claim of unjust enrichment. We vacate the judgment and remand with directions.

I. Background

ALSCO owns real property in Denver. It retained CBS as the general contractor to construct improvements on the property. CBS subcontracted with Excel Metals, Inc. to supply and erect steel for the construction project. Excel, in turn, subcontracted with Redd to provide labor and supplies for a portion of the steel work. Redd performed its work but was not paid by Excel.

Redd then commenced this action, asserting claims against Excel, CBS, and ALSCO for breach of contact, unjust enrichment, foreclosure of a mechanics' lien, and an adjudication of the rights of all parties claiming an interest in ALSCO's property. Redd was unable to locate or personally serve Excel or its registered agent and therefore served Excel by mail pursuant to section 7-90-704(2), C.R.S. 2008. Excel filed no response, and the trial court entered a default against it.

After CBS and ALSCO answered the complaint, Redd filed a "contested motion for judgment on the pleadings," asserting that the facts stated in the complaint and the answer established its right to

recover on its unjust enrichment claim. Shortly thereafter, CBS and ALSCO moved for summary judgment on all of Redd's claims, and the parties submitted affidavits supporting and opposing summary judgment. As to the unjust enrichment claim, CBS and ALSCO took the position that, under *DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115 (Colo. 1998) (*DCB*), they could not have been "unjustly" enriched by Redd's services because they had engaged in no improper conduct. Redd argued that *DCB* was inapplicable and that defendants were liable because they received a benefit at Redd's expense.

The trial court entered summary judgment for ALSCO and CBS on three of Redd's four claims. It concluded that Redd's claim to foreclose its mechanics' lien was untimely, that there was no contract between Redd and CBS or Redd and ALSCO that would support a claim for breach of contract, and that Redd had no interest in the property that would permit it to seek adjudication of rights to the property. Redd has not appealed from this ruling.

On the same day it entered summary judgment, the trial court issued the following order granting Redd's motion for judgment on the pleadings:

> The Court, having reviewed the Plaintiff's Complaint and Motion, and Defendants' Answer and response to the Motion, if any, and considering itself sufficiently advised, hereby grants Plaintiff's Motion and orders the following:

> *DCB* . . . is not applicable in this case. Judgment is entered in favor of Redd Iron, Inc. against Defendants CBS and Alsco, jointly and severally in an amount to be determined.

The trial court subsequently entered judgment for Redd for $ 28,304 based on the parties' stipulation that that amount represented "the unpaid balance owed to Redd Iron for the work done for steel work which was fabricated for the Project."

II. Analysis

ALSCO and CBS contend that the trial court erred in ruling that, as a matter of law, Redd was entitled to recovery on its unjust enrichment claim. We conclude that the judgment must be vacated and the case remanded to permit the court to consider whether, under the standards set forth below, Redd is entitled to recovery on this claim and to make findings explaining the basis for its determination.

A. Standard of Review

In considering a motion for judgment on the pleadings pursuant to C.R.C.P. 12(c), the trial court must construe the allegations in the pleadings strictly against the movant, must consider the allegations of the opposing parties' pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings. *Connecticut General Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684, 687 (Colo. App. 1995), *aff'd sub nom. Constitution Associates v. New Hampshire Ins. Co.*, 930 P.2d 556 (Colo. 1996); *see City*

& County of Denver v. Qwest Corp., 18 P.3d 748, 754 (Colo. 2001) (by granting plaintiffs' motion for judgment on pleadings, "the district court necessarily determined, in light of the controlling law and undisputed facts, that the matter could finally be resolved at that stage"). Our review of a trial court's determination of such a motion is de novo. *Connecticut General Life Ins. Co.*, 911 P.2d at 687.

C.R.C.P. 12(c) states that if matters outside the pleadings are presented on a motion for judgment on the pleadings "and not excluded by the court," the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Here, when the trial court ruled on Redd's motion for judgment on the pleadings, it had before it affidavits submitted in connection with the pending summary judgment motion filed by ALSCO and CBS. The court did not expressly exclude those affidavits, and we cannot determine whether the court in fact considered them in entering judgment for Redd. However, even if Redd's motion is treated as one for summary judgment under C.R.C.P. 56, our analysis remains the same. Entry of judgment was proper under that rule only if the material facts were undisputed and Redd was entitled to judgment as a matter of law. *See* C.R.C.P. 56(c). Our review remains de novo. *See Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, 901 P.2d 1251, 1256 (Colo. 1995).

B. Unjust Enrichment

1. General Principles

Unjust enrichment is a form of quasi-contract or contract implied in law. The test for recovery under an unjust enrichment theory, as stated by the Colorado Supreme Court, requires a showing that: "(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." *Robinson v. Colorado State Lottery Division*, 179 P.3d 998, 1007 (Colo. 2008); DCB, 965 P.2d at 119-20.

If the elements of unjust enrichment are established, the party who has received the benefit is ordinarily required to make restitution in the amount of enrichment received. That amount is often, but not always, coextensive with the other party's loss. Where the amount of the recovery may reasonably be measured in different ways, the choice is within the discretion of the trial court. *See Engel v. Engel*, 902 P.2d 442, 445 (Colo. App. 1995); *W.H. Woolley & Co. v. Bear Creek Manors*, 735 P.2d 910, 912 (Colo. App. 1986); Restatement (First) of Restitution § 1 cmts. a,d (1937).

Whether a party is entitled to recovery on a theory of unjust enrichment requires a trial court to "engage in a highly fact-intensive inquiry," *Dudding v. Norton Frickey & Associates*, 11 P.3d 441, 445 (Colo. 2000), and to "make extensive factual findings to determine whether a party has been unjustly enriched." *Lewis v. Lewis*, 189 P.3d 1134, 1140 (Colo. 2008). Where a ruling on unjust enrichment is based on facts developed at trial, an appellate court affords deference to the trial court's discretion to fashion equitable remedies, and it reviews for abuse of discretion; nevertheless, whether the trial court has applied the appropriate test to

determine the existence of unjust enrichment is reviewed de novo on appeal. *Id.* at 1140-41.

It is the third prong of the unjust enrichment test -- namely, whether the enrichment of the defendant was "unjust" -- that "creates difficult questions for trial courts." *Id.* at 1142; *see* DCB, 965 P.2d at 120 ("The notion of what is or is not 'unjust' is an inherently malleable and unpredictable standard."). Because the third prong of the unjust enrichment test is the focus of the dispute in this case, we turn our analysis to the standards governing that determination.

2. Standards for Determining Whether Enrichment is "Unjust"

In *DCB*, a contractor who had been hired by a commercial tenant to remodel its premises brought an unjust enrichment action against the landlord after the tenant became insolvent and could not pay for the work. After discussing unjust enrichment generally and the difficulties of determining what is unjust in a particular case, the supreme court concluded that it was "important to articulate a general rule, applicable in this context, that provides more stability and predictability than an ad hoc review." 965 P.2d at 120. The court continued:

> With this principle in mind, we begin our analysis with two basic propositions. First, there is the general rule that when an individual who is not the owner orders improvements on the owner's land and then fails to pay the contractor or supplier, "the owner is not liable to the contractor or supplier unless he agreed to pay

> them." 3 Dan B. Dobbs, *The Law of Remedies* § 12.20(3) at 473 (2d ed. 1993) . . . .
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> . . . .
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> Second, the Restatement of Restitution § 110 provides that "[a] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely* because of the failure of performance by the third person." Restatement of Restitution § 110 (1937) . . . .

Id. at 121 (emphasis in original).

Applying those principles to the case before it, the court concluded that the landlord's mere ownership of the improved property was not enough to subject it to liability. It disapproved the portion of a case from this court, *Frank M. Hall & Co. v. Southwest Properties Venture*, 747 P.2d 688, 690-91 (Colo. App. 1987), that would have permitted the tenant's unpaid contractor to recover from the landlord based solely on the fact that the landlord had given permission for the work and had taken an active role in its completion. *See DCB*, 965 P.2d at 122. Rather, the supreme court concluded: "[W]e hold that injustice in this context requires some type of improper, deceitful, or misleading conduct by the landlord." *Id.* Because there was no evidence that the landlord had engaged in such conduct, the tenant's contractor could not recover from the landlord on an unjust enrichment claim.

The rule announced in *DCB* was applied in R.A.S. Builders, Inc. v. Euclid & Commonwealth Associates,

965 P.2d 1242, 1244 (Colo. 1998), a case announced the same day as *DCB* and also involving a claim by a tenant's contractor against a landlord. There, the supreme court explained its rule as follows:

> In *DCB Construction*, we held that it is not enough that a tenant breached its contract to pay a contractor and that the landlord owns the property improved by the construction. . . . Instead, we concluded that the facts must also demonstrate an injustice such as fraud or coercion. . . . At a minimum, there must be some type of improper, misleading, or deceitful conduct by the owner. Otherwise, we adhere to the general rule that an owner is not liable for improvements made to his property for which he did not agree to pay.

Id. The supreme court also cited *DCB* in support of its statement in *Dudding*, 11 P.3d at 445 -- a case concerning the right of an attorney to recover in quantum meruit or unjust enrichment -- that: "Whether injustice results often will turn on whether a party engaged in some type of wrongdoing."

Divisions of this court have reached differing conclusions regarding the applicability of *DCB*'s "improper conduct" requirement in other contexts. *Compare Ameriquest Mortgage Co. v. Land Title Ins. Corp.*, P.3d , , 2007 Colo. App. LEXIS 1400 (Colo. App. No. 06CA0847, July 26, 2007)(*cert. granted* Aug. 4, 2008) (lender's failure to present evidence of wrongdoing by deed of trust beneficiary did not preclude lender's request for equitable subrogation on theory of unjust enrichment; division stated that it did

"not read . . . *DCB* as requiring a showing of wrongful conduct in every unjust enrichment case"), *with Ciccarelli v. Guaranty Bank*, 99 P.3d 85, 90 (Colo. App. 2004) (relying on *DCB* in concluding that trial court misapplied third element of unjust enrichment claim where there was no evidence that defendant bank had acted in an improper or deceitful manner), *overruled in part on other grounds by Lewis*, 189 P.3d at 1141.

In *Lewis* -- announced in 2008, ten years after *DCB* and shortly after the entry of the judgment at issue in this appeal -- the supreme court addressed the scope of its holding in *DCB*.

Lewis involved a dispute among family members over the proceeds from the sale of a house. The supreme court concluded that, in such circumstances, it was necessary to consider the "mutual purpose" of the parties in determining the third prong of the unjust enrichment test. 189 P.3d at 1143. In so concluding, the court held that the "particularized analysis for the third prong of unjust enrichment" enunciated in *DCB* was limited to the landlord-tenant contractor context:

> [In *DCB*] [w]e held that, in claims against a landlord, where there is no direct relationship between the landlord and the contractor creating a contract or quasi-contract and the landlord did not act fraudulently, the landlord is not unjustly enriched when he receives a benefit from the failed contract between a tenant and a party working at the tenant's behest. . . . However, we were quick to note that the requirement of malfeasance is specific to a contractor's claim that the landlord was unjustly enriched and did

> not extend to all unjust enrichment circumstances.

Id. at 1142. According to the *Lewis* court, the rule set forth in *DCB* was "crafted . . . '[b]ecause tenants frequently contract for improvements to leased property, [and therefore] the law must be sufficiently predictable so that the appropriate parties can adequately calculate and make adjustments for the risks they face.'" *Id.* (quoting *DCB*, 965 P.2d at 121). The court also noted that, in *Ameriquest*, the division had "correctly held that our *DCB* holding requiring malfeasance applies only in situations where a landlord receives a benefit from a failed contract between a tenant and a party working at the tenant's behest." *Lewis*, 189 P.3d at 1143 n.5.

Thus, the supreme court has now made clear that the "particularized analysis" of *DCB*, which requires a showing of malfeasance in order to establish the third unjust enrichment prong, was intended to apply specifically to claims against a landlord by a party working at the tenant's behest, and that malfeasance need not invariably be shown to establish unjust enrichment.

However, that conclusion does not resolve the issue presented here -- namely, what showing must a subcontractor make to establish that retention of benefits it provided to a property owner or a general contractor is "unjust" for purposes of the third prong of the unjust enrichment test. While the inquiry will depend to a large extent on the facts of the specific case, *see DCB*, 965 P.2d at 120, certain generally applicable principles can be gleaned from our supreme

court's cases, from the authorities on which the supreme court has relied, and from cases from other jurisdictions that have addressed the issue.

3. Unjust Enrichment Claims by Subcontractors Against Property Owners and General Contractors

For the reasons set forth below, we conclude that a subcontractor seeking recovery from a property owner or a general contractor on an unjust enrichment theory must, to satisfy the third prong of the unjust enrichment test, establish some basis for finding injustice beyond the simple facts that (1) the owner or contractor benefitted from services the subcontractor provided, and (2) the subcontractor was not paid for its work.

In so concluding, we note first that the "general rules" recognized by the supreme court in *DCB* and *R.A.S.* -- i.e., that a property owner is generally not liable for improvements on his property for which he did not agree to pay, and that mere nonperformance of a contract by a third person is not enough to require the benefitted party to compensate the party suffering a loss because of such nonperformance -- are not limited to the context of disputes between landlords and parties who contracted with their tenants. Restatement of Restitution § 110, cited in *DCB*, states: "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." Neither the rule stated in that section nor the illustrations following it suggest that the rule is limited to any specific context.

Additionally, section 12.20(3) from Dobbs, *The Law of Remedies* -- also cited in *DCB* -- makes clear that the principle it discusses is applicable in situations involving claims by subcontractors against property owners:

> In the subcontractor setting, the rule insulates the owner from liability, even though the owner benefitted from a subcontractor's work, knows the work is being done, and wishes to have the improvement; this is so because the owner's agreement is to pay the general contractor, not the subcontractor. An additional reason is that if the owner has paid the general contractor the price due, the owner is not enriched in any legal sense; he will have received what was his due under the contract, no more.

Id. at 472-73.

Cases from other jurisdictions, adopting the position stated in Dobbs and in Restatement of Restitution § 110, have generally declined to allow unjust enrichment recovery by subcontractors against property owners or by sub-subcontractors against general contractors with whom they did not deal directly. *See Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Maryland*, 342 Md. 169, 674 A.2d 534, 540-41 (Md. 1996) (collecting cases, and observing that: "The reported decisions involving claims by unpaid subcontractors against owner based on unjust enrichment do indeed almost uniformly deny relief, and . . . these cases do not turn on whether the owner has fully paid the general contractor."); *see also Advance Leasing & Crane Co. v. Del E. Webb Corp.*, 117 Ariz. 451, 573 P.2d 525, 527

(Ariz. Ct. App. 1977) ("[Supplier] assumed the risk that [subcontractor] would be able to pay. This risk cannot now be shifted to [the general contractor]."); *Season Comfort Corp. v. Ben A. Borenstein Co.*, 281 Ill. App. 3d 648, 655 N.E.2d 1065, 1071, 211 Ill. Dec. 682 (Ill. App. Ct. 1995) (secondary subcontractor could not recover from general contractor or property owner on unjust enrichment theory; subcontractor had not availed itself of mechanics' lien remedy, and it was not unjust to allow general contractor or property owner to retain benefits acquired); *Guldberg v. Greenfield*, 259 Iowa 873, 146 N.W.2d 298, 305-06 (Iowa 1966) (subcontractor who was not paid by general contractor was not entitled to recover from homeowners on unjust enrichment theory); *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738, 745 (Kan. 1988) (company that sold parts to a supplier had no unjust enrichment claim against contractor); *Pendleton v. Sard*, 297 A.2d 889, 895 (Me. 1972) ("[W]e conclude that under ordinary and usual circumstances the equities will not permit the supplier of labor and materials to obtain a personal judgment against the owner with whom he had no contractual dealings."); *Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. Ct. App. 2004) (subcontractors were not entitled, under unjust enrichment theory, to recover from project developer the funds that were forfeited by bankrupt general contractor); *Insulation Contracting & Supply v. Kravco, Inc.*, 209 N.J. Super. 367, 507 A.2d 754, 760 (N.J. Super. Ct. App. Div. 1986) (sub-subcontractors had no unjust enrichment claim against general contractor); *see generally* J.R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor Who Has Dealt Only with Primary Contractor to Recover Against Property*

Owner in Quasi Contract, 62 A.L.R.3d 288 (1975 & 2008 cum. supp.).

We acknowledge that some of the cases discussed above have cited the subcontractor's failure to pursue other available legal remedies, such as foreclosure of a mechanics' lien, as one basis for holding that unjust enrichment relief was unavailable. In our view, this rationale would not alone preclude recovery on an unjust enrichment claim under Colorado law. *See* § 38-22-124, C.R.S. 2008 ("No remedy given in this article [the general mechanics' lien law] shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise provided in this article."); *DCB*, 965 P.2d at 118 n.2 ("By statute and case law, contractors and others may still pursue any other available remedies [in addition to mechanics' lien remedies], such as breach of contract or unjust enrichment."); *Frank M. Hall & Co.*, 747 P.2d at 690. Therefore, we do not agree with ALSCO's and CBS's argument that allowing unjust enrichment recovery after Redd let its lien rights expire would eviscerate the procedural requirements of the mechanics' lien law.

Nevertheless, we conclude that the broader principle recognized in the cases and the authorities cited above is consistent with the "general rule" recognized by the Colorado Supreme Court in *R.A.S.* and *DCB* -- namely, that property owners are ordinarily not liable to unpaid subcontractors on an unjust enrichment claim merely because they benefitted from the services provided. We do not read *Lewis* to hold that the supreme court would depart from this general rule in cases involving unjust enrichment claims by subcontractors.

C. Application

Turning to the case before us, we first note that the trial court did not err in concluding that the "improper conduct" requirement of *DCB* was inapplicable here. It does not follow from this, however, that Redd was entitled to judgment as a matter of law on its unjust enrichment claim.

Redd was required to prove all three elements of that claim, as well as the value of the benefit it conferred. *See DCB*, 965 P.2d at 119-20; *Engel*, 902 P.2d at 445. As to the first two elements, it appears undisputed that Redd performed services and that it was not paid the $ 28,304 that it claimed was owed to it. However, although CBS and ALSCO admitted in their answer that Redd had conferred a benefit on Excel, and that Excel "accepted the benefit under circumstances that would render it unjust for it not to pay" for the benefit, CBS and ALSCO did not admit that they themselves had been benefitted or that the value of any such benefit was $ 28,304.

Also, in his affidavit opposing summary judgment, Redd's president attested that discovery was "required to ascertain . . . facts such as what payments [defendants] have made for materials and services furnished by Redd Iron, whether [defendants'] payments to Excel, if any, allegedly included payments for the work performed by Redd Iron, on what dates and to whom those payments were allegedly made, and the date of the last work performed, the last materials furnished, or the date of completion of the building or improvement on the property." Further, although CBS's president stated in his affidavit that "CBS paid

to Excel all amounts which CBS owed to it," and "ALSCO paid to CBS all amounts which ALSCO owed to it," he also attested that Excel had "failed to properly complete its work and, indeed, abandoned the project."

In these circumstances, it cannot be said that the first two elements of Redd's unjust enrichment claim, and the value of any benefit conferred, have been established as a matter of law.

Further proceedings are also required to determine whether, even if the first two elements of the unjust enrichment claim are established, the circumstances make it "unjust" for ALSCO and CBS to retain any benefit they received. As discussed above, ALSCO's ownership of the property, and CBS's status as a general contractor who has been paid, do not alone make their retention of such benefit unjust. Nor does Excel's failure to pay Redd suffice, without more, to satisfy the third unjust enrichment prong. Although CBS's president has attested that all amounts owing were paid, we cannot determine as a matter of law that Redd will be unable to show that other circumstances would render defendants' retention of the benefits unjust. Such a determination requires a "highly fact-intensive inquiry," *Dudding*, 11 P.3d at 445, and that inquiry is within the province of the trial court, not this court.

Accordingly, we vacate the judgment in favor of Redd on its unjust enrichment claim and return the case to the trial court with directions to determine, under the standards set forth above and after consideration of such additional argument and evidence as the court may require, whether the elements of unjust

enrichment have been established. The trial court is also to make findings of fact sufficient to explain the basis for its determination.

The judgment is vacated and the case is remanded for further proceedings in accordance with the views set forth here.

JUDGE RUSSEL and JUDGE GABRIEL concur.